This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

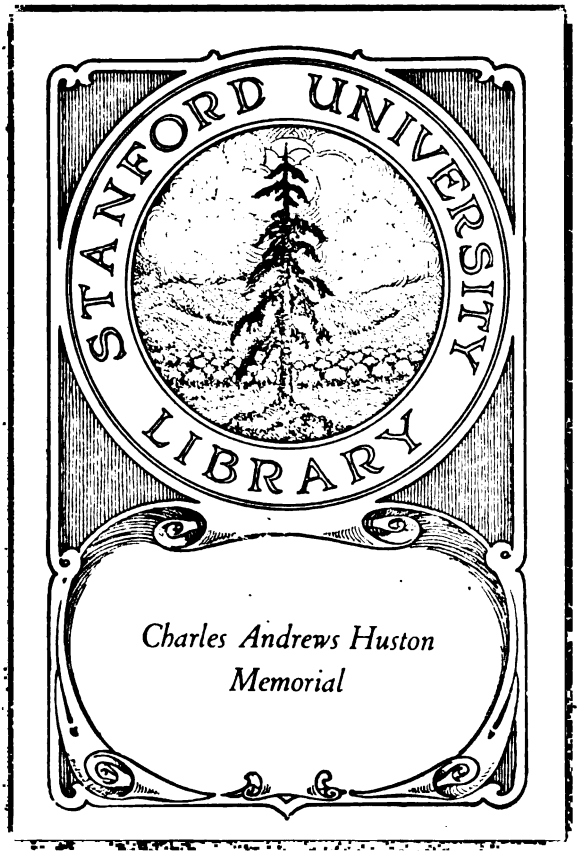
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`


STANFORD UNIVERSITY
LIBRARY
Charles Andrews Huston
Memorial

C. H. Huston

AB
AM
AX
MC

Modern American Law

A Systematic and Comprehensive Commentary on the Fundamental Principles of American Law and Procedure, Accompanied by Leading Illustrative Cases and Legal Forms, with a Revised Edition of Blackstone's Commentaries

PREPARED BY

JUDGES, MEMBERS OF THE BAR, TEACHERS IN LAW SCHOOLS, AND WRITERS ON LEGAL SUBJECTS

•

UNDER THE EDITORIAL SUPERVISION OF

EUGENE ALLEN GILMORE, A. B., LL. B.
PROFESSOR OF LAW, UNIVERSITY OF WISCONSIN

ASSISTED BY

WILLIAM CHARLES WERMUTH, M. S., LL. B.
LAW LECTURER, NORTHWESTERN UNIVERSITY

FIFTEEN VOLUMES

BLACKSTONE INSTITUTE
CHICAGO

Modern American Law

LAW OF DESCENT AND DISTRIBUTION
WILLS AND ADMINISTRATION
GUARDIAN AND WARD

BY

CHARLES S. CUTTING, LL.D.,
FORMER JUDGE OF THE PROBATE COURT OF COOK COUNTY, ILLINOIS

LAW OF LANDLORD AND TENANT

BY

WILLIAM L. BURDICK, Ph.D., LL.B.,
PROFESSOR OF LAW, UNIVERSITY OF KANSAS

LAW OF IRRIGATION AND WATER RIGHTS

BY

JAMES W. McCREERY,
LECTURER ON IRRIGATION AND WATER RIGHTS, UNIVERSITY OF COLORADO

LAW OF MINES AND MINING

BY

WILLIAM EDWARD COLBY, LL.B.,
LECTURER ON THE LAW OF MINES, UNIVERSITY OF CALIFORNIA

VOLUME VI

BLACKSTONE INSTITUTE
CHICAGO

311865

COPYRIGHT, 1914
BY
BLACKSTONE INSTITUTE

Modern American Law

SUBJECTS AND AUTHORS

VOLUME I.

General Introduction.....Eugene A. Gilmore, A.B., LL.B.,
University of Wisconsin.

The Modern Democracy, the Citizen and the Law.....John B. Winslow, A.B., LL.B.,
Supreme Court, Wisconsin.

Legal Ethics.....Orrin N. Carter, LL.D.,
Supreme Court, Illinois.

Law—Its Origin, Nature and Development .....Charles A. Huston, A.B., J.D., J.S.D.,
Leland Stanford Jr. University.

Courts—Federal and State.....Arthur L. Sanborn, LL.B.,
United States District Court.

Contracts .....William C. Wermuth, M.S., LL.B.,
Northwestern University.

VOLUME II.

Torts:

Introduction—Trespass.....William C. Jones, A.B., M.A.,
University of California.

Conversion.....Frank L. Simpson, A.B., LL.B.,
Boston University.

Negligence and Legal Cause....Barry Gilbert, A.B., LL.B.,
State University of Iowa.

Deceit .....Edward D. Osborn,
University of Kansas.

Defamation .....Charles M. Hepburn, A.B., LL.D.,
Indiana University.

Malicious Prosecution.....John C. Townes, LL.D.,
University of Texas.

Domestic and Business Relations.William C. Jones, A.B., M.A.,
University of California.

Right of Privacy.....William C. Jones, A.B., M.A.,
University of California.

Miscellaneous—Explosives, Etc..George F. Wells, LL.D.,
University of West Virginia.

Fellow Servant Doctrine.....Theophilus J. Moll, Ph.B., LL.B.,
American Central Law School.

VOLUME III.

Criminal Law.....William E. Mikell, B.S.,
University of Pennsylvania.
Criminal Procedure.....William L. Burdick, Ph.D., LL.B.,
University of Kansas.
Persons and Domestic Relations.....Elmer M. Liessmann, LL.B.,
Northwestern University.

VOLUME IV.

Personal Property and Bailments....Henry W. Ballantine, A.B., LL.B.,
University of Wisconsin.
Liens and Pledges.....R. L. Henry, Jr., Ph.B., J.D., B.C.L.,
University of North Dakota.
Agency .....William A. Ferguson, A.M., LL.B.,
Fordham University.
Sales .....H. Claude Horack, Ph.B., LL.B.,
State University of Iowa.

VOLUME V.

Real Property.....Arthur W. Blakemore, A.B., LL.B.,
Of the Boston Bar.

VOLUME VI.

Descent—Wills—Administration—
Guardian and Ward.....Charles S. Cutting, LL.D.,
Of the Chicago Bar.
Landlord and Tenant.....William L. Burdick, Ph.D., LL.B.,
University of Kansas.
Water Rights and Irrigation.....James W. McCreery,
University of Colorado.
Mines and Mining.....William E. Colby, LL.B.,
University of California.

VOLUME VII.

Equity .....John N. Pomeroy, A.M., LL.B.,
University of Illinois.
Trusts .....George G. Bogert, A.B., LL.B.,
Cornell University.
Quasi-Contracts .....Arthur M. Cathcart, A.B.,
Leland Stanford Jr. University.
Estoppel .....Oliver S. Rundell, LL.B.,
Of the Wisconsin Bar.

VOLUME VIII.

Negotiable Instruments.....William G. Hale, B.S., LL.B.,
University of Illinois.
Guaranty and Suretyship.....Charles E. Carpenter, A.M., LL.B.,
University of North Dakota.

Mortgages—Real and Chattel.....Manley O. Hudson, A.M., LL.B.,
University of Missouri.
Statutory Interpretation.....John R. Rood, LL.B.,
University of Michigan.

VOLUME IX.

Private Corporations.....I. Maurice Wormser, A.B., LL.B.,
Fordham University.
Partnership .....Eugene A. Gilmore, A.B., LL.B.,
University of Wisconsin.
Banks and Trust Companies.....James L. Hopkins, LL.B.,
Of the St. Louis Bar.
Receivers .....Theophilus J. Moll, Ph.B., LL.B.,
American Central Law School.

VOLUME X.

Pleadings in Civil Actions.....Louis B. Ewbank, LL.B.,
Indiana Law School.
Practice in Civil Actions.....William N. Gemmill, LL.B., LL.D.,
Municipal Court of Chicago.
Equity Pleading and Practice.....William E. Higgins, B.S., LL.B.,
University of Kansas.
Evidence .....John T. Loughran, LL.B.,
Fordham University.
Attachments and Garnishments.....Oliver A. Harker, A.M., LL.D.,
University of Illinois.
Judgments and Executions.....John R. Rood, LL.B.,
University of Michigan.
Extraordinary Remedies.....Harvey N. Shepard, A.B.,
Boston University.
Habeas Corpus.....John Wurts, M.A., LL.B., M.L.,
Yale University.

VOLUME XI.

Constitutional Law:
Definitions and Principles.....James W. Garner, B.S., Ph.D.,
University of Illinois.
Organization and Powers of the United States Government....James Wilford Garner, B.S., Ph.D.,
University of Illinois.
Constitutional Guaranties of Fundamental Rights.....Emlin McClain, A.M., LL.B., LL.D.,
Leland Stanford Jr. University.
Eminent Domain.....Philip Nichols, A.B., LL.B.,
Of the Boston Bar.
Taxation .....Philip Nichols, A.B., LL.B.,
Of the Boston Bar.
Naturalization .....George F. Tucker, A.B., Ph.D., LL.B.,
Of the Boston Bar.

VOLUME XII.

Conflict of Laws.....George L. Clark, A.B., LL.B., J.S.D.,
University of Missouri.
International Law.....Paul S. Reinsch, A.B., Ph.D., LL.B.,
University of Wisconsin.
Interstate Commerce.....Dudley O. McGovney, A.M., LL.B.,
Tulane University.
Bankruptcy .....George Lawyer, A.M., LL.B.,
Albany Law School.
Patents .....George C. Holt, A.B., LL.B., LL.D.,
United States District Court.
Copyrights .....William L. Symons, LL.M., M.P.L.,
Washington College of Law.
Trademarks .....William L. Symons, LL.M., M.P.L.,
Washington College of Law.
Unfair Competition and Good Will..James L. Hopkins, LL.B.,
Of the St. Louis Bar.

VOLUME XIII.

Public Service Companies—Carriers..Bruce Wyman, A.M., LL.B.,
Harvard University.
Municipal Corporations.....Henry H. Ingersoll, M.A., LL.D.,
University of Tennessee.
Public Officers and Elections.....Edwin Maxey, D.C.L., LL.D.,
University of Nebraska.
Parliamentary Law.....John H. Perry, M.A., LL.B.,
Yale University.

VOLUME XIV.

Damages .....William P. Rogers, A.B., LL.D.,
Cincinnati Law School.
Insurance .....Henry W. Humble, A.M., LL.B.,
University of Kansas.
Admiralty Law and Practice.....George C. Holt, A.B., LL.B., LL.D.,
United States District Court.
Medical Jurisprudence.....George F. Wells, LL.D.,
University of West Virginia.
Forms .....Francis L. Harwood, A.B., LL.B.,
Of the Chicago Bar.

VOLUME XV.

Blackstone .....Henry W. Ballantine, A.B., LL.B.,
University of Wisconsin.
Cumulative Index.....Frederick W. Schenk,
University of Chicago.

PREFACE.

Volume Six of Modern American Law is devoted to specialized branches of the law of both real and personal property.

The intricate body of rules and cases governing the inheritance of real and personal property, and the rights and duties of guardian and ward, are included in the first treatise of this volume, "Law of Descent and Distribution—Wills and Administration—Guardian and Ward." The author of this important treatise is Honorable Charles S. Cutting, LL.D., for many years Judge of the Probate Court of Cook County, Illinois.

Professor William L. Burdick, Ph.D., LL.D., of the University of Kansas, outlines under the title, "Law of Landlord and Tenant," the rights and duties of lessor and lessee in the leasing of real property.

The peculiar rights of landowners to water in, on, and contiguous to their land are ever-increasing sources of litigation. Professor James W. McCreery, of the University of Colorado, discusses these rights in his work on "Law of Irrigation and Water Rights."

Other rights in land relate to the wealth to be found beneath the surface of the earth. Its technical terms and its rapid modern development make the mining law of the United States a difficult and complicated subject. Professor William Edward Colby, LL.B., of the University of California, embodies in his treatise, "Law of Mines and Mining," a clear exposition of this branch of the law.

TABLE OF CONTENTS

(The figures refer to those at the foot of the pages.)

LAW OF DESCENT AND DISTRIBUTION WILLS AND ADMINISTRATION GUARDIAN AND WARD

INTRODUCTION AND CLASSIFICATION.

SECTION		PAGE
1.	Classification	1
2.	Descent	3
3.	Wills	4
4.	Administration	4
5.	Minors' estates	4

PART I.

DESCENT AND DISTRIBUTION.

CHAPTER I.

DESCENT.

6.	Defined	5
7.	Historical	5
8.	Common law	5
9.	Descent only as to real property	6
10.	The canons	7
11.	How property descended	7
12.	Canon No. 1	8
13.	Canon No. 2	8

SECTION		PAGE
14.	Canon No. 3	8
15.	Canon No. 4	9
16.	Canon No. 5	9
17.	One who takes by will a purchaser	10
18.	Canon No. 6	10
19.	Canon No. 7	11
20.	Who last died actually seized	11
21.	Last seized	11
22.	Entry	12
23.	Rule now changed	12
24.	Escheat	13
25.	Forfeiture and reversion	13
26.	Lineal and collateral	14
27.	Who is heir at common law?	16
28.	Under statute—Widow	16
29.	Legitimated children	16

CHAPTER II.

DISTRIBUTION.

30.	Definition	17
31.	In general—Provisions of the Statute of Distribution	17
	Typical statute on descent and distribution	19
32.	Statutes of Distribution and the common law	23
33.	The Illinois statute examined	24

PART II.

WILLS AND ADMINISTRATION.

DIVISION I.

HISTORY AND NATURE IN GENERAL.

CHAPTER III.

WILLS DEFINED.

34.	Definitions	26
35.	Same subject—Written and unwritten wills	28

SECTION PAGE
36. Same subject—Codicil defined 29
37. Same subject—A will distinguished from a gift... 29

CHAPTER IV.

ORIGIN, HISTORY AND NATURE OF WILLS.

38. Origin of wills coincident with the rise of private property 31
39. The status of the will in England prior to 1066..... 32
40. The status of the will after 1066 A. D..... 32
41. The attempt of the courts of equity to revive the right to will lands..... 33
42. The Statute of Wills..... 34
43. History of wills and testaments in the United States 36
44. Extent of testamentary power—General rule..... 36
45. Same subject—Exceptions to the general rule..... 37
46. Same subject—After-acquired real estate..... 41
47. The testator's right to make a will is not a property right 41
48. Agreement to will..... 43
49. Mutual, and joint and mutual wills..... 43
50. Alternative wills 46
51. The rights of devisees under a valid will become vested property rights at the death of the testator 47

CHAPTER V.

CAPACITIES OF TESTATORS AND BENEFICIARIES IN GENERAL.

52. Who may make a will—The present general rule... 49
53. Disabilities affecting certain persons..... 50
54. Same subject—Modern rule as to right of married woman to dispose of property by will..... 52
55. Disabilities as regards age..... 54
56. Same subject—Effect of statutory requirements as to age 55
57. Who may take by will—The general rule..... 55

SECTION PAGE
58. Exceptions to the general rule..... 55
59. Same subject—Corporations 56
60. Same subject—Other cases 57
61. Same subject—Illegitimate children 57

DIVISION II.

THE EXECUTION, REVOCATION, REVIVAL AND REPUBLICATION OF WILLS.

CHAPTER VI.

GENERAL PRINCIPLES.

62. In general 59
63. A will is ambulatory..... 59
64. Wills purely statutory..... 60

CHAPTER VII.

THE EXECUTION OF WILLS.

Section A. Fraud, Undue Influence, and Mistake.

65. Fraud and undue influence..... 75
66. What is fraud?..... 75
67. False identity or character..... 76
68. Where deceiver is innocent..... 77
69. Undue influence 78
70. Matter of proof..... 79
71. Mistake 81
72. Mistake as to contents of will..... 82
73. Mistake as to matters other than the contents of the will 84
74. Ambiguities 84
75. Ambiguitas patens 85
76. Ambiguitas latens 85

Section B. Form of the Will.

77. In general 87

SECTION PAGE
78. Same subject—Signature 87
79. Same subject—What is signing?..... 88
80. Same subject—Where the signature should appear. 88
81. Incorporation by reference..... 89
82. Same subject—Under the Statute of Frauds..... 90
83. Same subject—Under the modern type of statute.. 92
84. Same subject—Reference to another but unattested document 93
85. Same subject—Advancements 96
86. Attestation—Competency of witnesses..... 96
87. Same subject—Who takes a beneficial interest?.... 98
88. What is attestation?..... 99
89. Attestation must follow the act attested..... 100
90. Attestation must be in the presence of the testator.. 101
91. Testator's intention 104

CHAPTER VIII.

REVOCATION OF WILLS.

92. By subsequent instrument..... 105
93. By destruction 107
94. What constitutes destruction?..... 109
95. By cancellation 111
96. Dependent relative revocation..... 112
97. Revocation by circumstances..... 119
98. Same subject—Under statutes 121
99. Same subject—Miscellaneous 122
100. Same subject—Married women 123

CHAPTER IX.

REPUBLICATION AND REVIVAL.

101. Republication 124
102. What does a codicil republish?..... 124
103. Revival 126

DIVISION III.

LAPSED, VOID, AND ADEEMED LEGACIES AND DEVISES.

CHAPTER X.

LAPSED AND VOID LEGACIES AND DEVISES.

SECTION		PAGE
104.	Distinction	129
105.	As to legacies	130
106.	As to devises—Lapsed	130
107.	Same subject—Void	131
108.	By statute	131
109.	Where the legacy or devise is to a class	132

CHAPTER XI.

ADEMPTION.

110.	Definition	133
111.	Revocation by conveyance	133
112.	Ademption of specific legacies	134
113.	Ademption of portions—Satisfaction by advancement	136
114.	Ademption in case of special purpose	137

PART III.

PROBATE OF WILLS AND ADMINISTRATION OF ESTATES.

DIVISION I.

DECEDENTS' ESTATES.

CHAPTER XII.

IN GENERAL.

115.	Probate	139
116.	When may a will be probated?	141
117.	Administration	142
118.	Same subject—In general	142

CHAPTER XIII.

ADMINISTRATION.

SECTION		PAGE
119.	Jurisdiction	145
120.	Who may claim appointment as administrator	148
121.	Qualification for the office of administrator or executor	150
122.	How the appointment is evidenced	151
123.	What may be done by the officer before the letters are issued	152
124.	Removal of executor or administrator	154
125.	The rights, duties, and liabilities of executors and administrators	155
126.	Same subject—Personal property as assets	157
127.	Same subject—Choses in action	158
128.	Same subject—The inventory and appraisal	160
129.	Same subject—Concerning the collection and possession of assets	161
130.	Same subject—Concerning the management of the estate	165
131.	Same subject—Concerning the liability of the officer	171
132.	Same subject—Concerning the payment of debts and legacies	173
133.	Co-executors and co-administrators	178
134.	Foreign representatives	180
135.	Administrator with the will annexed	181
136.	Administrator de bonis non	181
137.	The accounting and discharge of the administrator	182

DIVISION II.

GUARDIAN AND WARD.

CHAPTER XIV.

DEFINITIONS AND GENERAL PRINCIPLES.

138.	Persons in loco parentis	184
139.	Guardianship defined	184

SECTION PAGE
140. Guardianship at common law..... 185
141. Guardianship in the United States..... 186
142. Same subject—The parents as natural guardians... 187
143. Appointment of guardians..... 187
144. Same subject—Appointment by the parent..... 187
145. Same subject—Appointment by the court..... 189
146. The court appointing..... 190
147. Who should be appointed guardian..... 190
148. Rights and duties of guardian..... 191
149. Same subject—Duties as to ward's person..... 191
150. Same subject—As to ward's property..... 192
151. Same subject—Sale of real estate by guardian.... 194
152. Guardian's accounts 194
153. Termination of the guardian's authority..... 195
154. Compensation of guardians..... 196
155. Rights and liabilities of the ward..... 197

Bibliography 198

LAW OF LANDLORD AND TENANT

INTRODUCTION.

CHAPTER I.

THE TENANCY.

SECTION		PAGE
1.	Subject matter	201
2.	Kinds of tenancy	202
3.	Duration of tenancy	211

CHAPTER II.

THE RELATION OF LANDLORD AND TENANT.

4.	How created	216
5.	Capacity of parties—In general	218
6.	Distinguished from other relations	224
7.	The landlord's reversion	227
8.	Attornment of tenant	227

CHAPTER III.

LEASES.

9.	Definition of a lease	229
10.	Distinguished from an agreement for a lease	229
11.	Distinguished from a license	230
12.	Distinguished from a conveyance	231
13.	Distinguished from contract to sell	231
14.	Requirements of a lease—In general	232

CHAPTER IV.

CONDITIONS, RESERVATIONS AND EXCEPTIONS.

15.	In general	242
16.	Definitions	242

SECTION PAGE
17. Kinds of conditions 243
18. How to create 244
19. Valid conditions 245
20. Construed as covenants when 246
21. Parties affected 247
22. Effect of breach 248
23. Exceptions and reservations 249

CHAPTER V.

COVENANTS.

24. Definitions and kinds 251
25. Construction of covenants 252
26. Breach of covenants 253
27. Landlord's covenants 253
28. Tenant's covenants 258

CHAPTER VI.

FIXTURES.

29. Meaning of fixtures 261
30. Rules for determining fixtures 262
31. Character of annexation 263
32. The relation of the parties 265
33. Landlord and tenant 266

CHAPTER VII.

THE LANDLORD'S RIGHTS, DUTIES AND LIABILITIES.

34. In general 270
35. Right to protect his interest 270
36. Right to assign reversion or lease 271
37. Remedies for rent 272
38. Liability for injuries 272
39. Right to repair and improve 277
40. Right to fixtures 278

CHAPTER VIII.

THE TENANT'S RIGHTS, DUTIES AND LIABILITIES.

SECTION		PAGE
41.	In general	279
42.	Right to possession	279
43.	Cannot deny landlord's title	282
44.	Use and enjoyment of premises	283
45.	Repairs	287
46.	Sub-letting and assigning	288
47.	Liability for injuries	288
48.	Fixtures	289
49.	Rent	290

CHAPTER IX.

RENT.

50.	Tenant's duty to pay	291
51.	Who is liable for rent	292
52.	Rent payable to whom	293
53.	Time and mode of payment	294
54.	Change in amount of rent	296
55.	Holding over term	297
56.	Premises untenantable	298
57.	Liens for rent	300
58.	Distress for rent	300
59.	Actions for rent	302

CHAPTER X.

TERMINATION OF TENANCY.

60.	In general	303
61.	Notice to quit	304
62.	Death of the parties	305
63.	Sale of premises	305
64.	Destruction of the premises	306
65.	Eviction	307
66.	Forfeiture	307

SECTION PAGE
67. Merger 308
68. Surrender 309
69. Eminent domain 310

CHAPTER XI.

DELIVERY AND RECOVERY OF POSSESSION.

70. Tenant's duty to deliver..... 312
71. Re-entry by landlord..... 312
72. Actions for recovery..... 313

Bibliography 314

LAW OF IRRIGATION AND WATER RIGHTS

CHAPTER I.

INTRODUCTORY—RIPARIAN RIGHTS.

SECTION		PAGE
1.	In general	315
2.	Public rights in water	315
3.	Water rights—Regulation	316
4.	Different systems result of diversities of climate	317
5.	Riparian rights defined	317
6.	The rule of returning water to stream	318
7.	The rule of reasonable use	319
8.	The doctrine of riparian rights unsuited to arid climates	320

CHAPTER II.

RIGHTS OF APPROPRIATION OF WATER.

9.	Appropriation defined	322
10.	The law of necessity	322
11.	Beginnings of the practice of appropriation	323
12.	Locus of use	324
13.	Beginnings of the law of appropriation	324
14.	The case of Atchison v. Peterson	325
15.	Appropriation always the rule in the arid parts of the country	326
16.	Theory of origin—Conflict	327

CHAPTER III.

WATER SUPPLIES SUBJECT TO APPROPRIATION.

17.	Public waters	329
18.	Natural streams of water courses	330

SECTION PAGE
19. Tributaries 331
20. Springs 331
21. Lakes 331
22. Flood waters 332
23. Underflow 333
24. Underground streams 334
25. Percolation 335
26. Seepage or return waters..... 336
27. Waste or diffused surface waters..... 338

CHAPTER IV.

HOW APPROPRIATIONS ARE MADE.

A. Founded on Beneficial Use.

28. Beneficial uses 340
29. Preferences 341
30. Relative economic values..... 341
31. Made by series of acts..... 342
32. Four steps or elements..... 343
33. The intent 344
34. First physical act..... 345
35. Statutes requiring notice..... 345
36. Rights acquired by things done..... 346
37. Legislation cannot affect substantial rights..... 346
38. Subsequent steps in making appropriations..... 348
39. The test—Beneficial use..... 348
40. Excessive diversion 348
41. Capacity of appliances..... 348
42. Extent of appropriation..... 349

B. Appropriator Must Be Diligent.

43. Diligence—The necessity for..... 349
44. Diligence to be adapted to actual condition of settler 350
45. Same subject 351

C. The Result of Diligence—The Rule of Relation.

46. Operation of rule..... 352
47. Definition 354

CHAPTER V.

WATER AND WATER RIGHTS AS PROPERTY.

SECTION		PAGE
48.	Ultimate source of title	355
49.	Original titles—Land and water	356
50.	Lands	357
51.	The Acts of Congress of 1866 and 1870	357
52.	Desert Land Act	358
53.	Water rights appurtenant	359
54.	Riparian rights	360
55.	Appropriation rights	360
56.	Rights acquired by appropriation are property	361
57.	Relative rights of appropriators	362
58.	Extent of rights	362
59.	Water rights real estate	364
60.	Methods of conveyance or transfer	365
61.	Change of point of diversion, and of place and character of use of water	366
62.	Limitation of right to change	367
63.	Rule as to what constitutes injury	367
64.	Burden of proof	368
65.	Greater diversion never allowed	368
66.	Greater acreage served no test of right or injury	368

CHAPTER VI.

EXTINGUISHMENT OF WATER RIGHTS.

67.	Various ways in which water rights may be lost	370
68.	Abandonment defined	370
69.	Intention to abandon	370
70.	Non-use not abandonment	371
71.	Non-use may raise a presumption of intent	371
72.	Analogy to rule of diligence	372
73.	Burden of proof	372
74.	Effect of abandonment	373
75.	Adverse user and prescription	373
76.	Prescription and appropriation distinguished	374
77.	Estoppel	374

CHAPTER VII.

STATUTORY REGULATION OF WATER RIGHTS.

A. Adjudication.

SECTION		PAGE
78.	Titles to water rights not of record	375
79.	Sworn statements of record	375
80.	Early methods of determining titles in water rights	376
81.	Early methods inadequate—Statutory provisions	376
82.	Difficulties to be remedied	376
83.	Legislation	377
84.	General statutory adjudication of water rights—Colorado—Procedure	378
85.	Proceeding—Quasi in rem	378
86.	Proofs taken before court or referee	379
87.	Decrees	379
88.	Decrees, force and effect	380
89.	Decrees, when final	380

B. Administration.

90.	Authority for distribution wanting	381
91.	The first plan adopted	381
92.	The statutory method of distribution	382
93.	Water commissioners	382
94.	Division engineers	382
95.	State engineers	383
96.	The police power of the state	383

CHAPTER VIII.

THE CONSTRUCTION AND CORPORATE MANAGEMENT OF WATERWORKS.

A. Physical Structures.

97.	Ditches and appliances	385
98.	Canals	385
99.	Reservoirs	386
100.	Dams	386
101.	Eminent domain	387
102.	Liability for damages	388

B. Ownership and Control of Canals and Waterworks.

SECTION		PAGE
103.	Early history of irrigation works	388
104.	Private corporations	389
105.	Quasi-public carriers	389
106.	Mutual ditch companies	390
107.	Appropriations acquired by ditch companies	390
108.	Irrigation districts	391

Bibliography 392

LAW OF MINES AND MINING

CHAPTER I.

THE HISTORY OF THE ORIGIN AND GROWTH OF MINING LAW IN THE UNITED STATES.

SECTION		PAGE
1.	Historical outline	393
2.	The mining laws of the original states	396
3.	The mining laws of the Middle West	397
4.	The public land states and territories	397
5.	The history of mining law	398
6.	First period—To 1848	398
7.	Lead and copper mines of the Middle West	399
8.	Second period—1848-1866	400
9.	Early mining districts and mining customs	401
10.	Organization of districts and nature of regulations.	402
11.	Judicial and legislative recognition of customs, usages and regulations	403

CHAPTER II.

FEDERAL LEGISLATION AFFECTING MINES AND PUBLIC LANDS.

12.	The Federal Act of July 26, 1866	405
13.	General comment on the Act of 1866	405
14.	The Congressional Act of July 9, 1870	406
15.	The Act of May 10, 1872	407
16.	Lodes	407
17.	Placer mines	408
18.	Miscellaneous provisions of the Act of 1872	408
19.	The American Mining Law	408
20.	Land tenure in the United States	409
21.	Grants by sovereigns	409
22.	Sale at auction	410

SECTION PAGE
23. Pre-emption 410
24. Homestead 410
25. Timber and Stone Act of 1878..... 411
26. Desert lands 411
27. Railroad grants 412
28. Town sites 412
29. Scrip 412
30. Indian and military reservations—National forests, national parks 412
31. Coal lands 413
32. Grants to states..... 413
33. Land patents 413

CHAPTER III.

MINERAL LANDS AND THOSE WHO MAY ACQUIRE RIGHTS TO THEM.

34. Terms used in the statutes..... 414
35. Various tests of mineral character..... 415
36. Mineral substances 416
37. Lodes and placers..... 416
38. Citizens 417
39. Aliens 417

CHAPTER IV.

VEINS OR LODES AND THEIR LOCATION.

40. Kinds of veins..... 418
41. Definition of vein or lode..... 418
42. Rock in place..... 420
43. Lode claims—Deposits in place..... 421
44. Location defined 422
45. Federal requirements 422
46. State legislation 423
47. Discovery 423
48. Nature of discovery required..... 424
49. Place of discovery..... 424
50. Time for marking a discovery..... 425

LAW OF MINES AND MINING

CHAPTER I.

THE HISTORY OF THE ORIGIN AND GROWTH OF MINING LAW IN THE UNITED STATES.

SECTION		PAGE
1.	Historical outline	393
2.	The mining laws of the original states	396
3.	The mining laws of the Middle West	397
4.	The public land states and territories	397
5.	The history of mining law	398
6.	First period—To 1848	398
7.	Lead and copper mines of the Middle West	399
8.	Second period—1848-1866	400
9.	Early mining districts and mining customs	401
10.	Organization of districts and nature of regulations.	402
11.	Judicial and legislative recognition of customs, usages and regulations	403

CHAPTER II.

FEDERAL LEGISLATION AFFECTING MINES AND PUBLIC LANDS.

12.	The Federal Act of July 26, 1866	405
13.	General comment on the Act of 1866	405
14.	The Congressional Act of July 9, 1870	406
15.	The Act of May 10, 1872	407
16.	Lodes	407
17.	Placer mines	408
18.	Miscellaneous provisions of the Act of 1872	408
19.	The American Mining Law	408
20.	Land tenure in the United States	409
21.	Grants by sovereigns	409
22.	Sale at auction	410

SECTION PAGE
23. Pre-emption 410
24. Homestead 410
25. Timber and Stone Act of 1878..... 411
26. Desert lands 411
27. Railroad grants 412
28. Town sites 412
29. Scrip 412
30. Indian and military reservations—National forests, national parks 412
31. Coal lands 413
32. Grants to states..... 413
33. Land patents 413

CHAPTER III.

MINERAL LANDS AND THOSE WHO MAY ACQUIRE RIGHTS TO THEM.

34. Terms used in the statutes..... 414
35. Various tests of mineral character..... 415
36. Mineral substances 416
37. Lodes and placers..... 416
38. Citizens 417
39. Aliens 417

CHAPTER IV.

VEINS OR LODES AND THEIR LOCATION.

40. Kinds of veins..... 418
41. Definition of vein or lode..... 418
42. Rock in place..... 420
43. Lode claims—Deposits in place..... 421
44. Location defined 422
45. Federal requirements 422
46. State legislation 423
47. Discovery 423
48. Nature of discovery required..... 424
49. Place of discovery..... 424
50. Time for marking a discovery..... 425

SECTION PAGE
51. Possession pending discovery..... 425
52. Discovery shaft 426
53. Posting the notice of location and its contents..... 428
54. Recording of the notice of location..... 429
55. Description of the claim..... 430
56. Marking the location on the ground..... 430
57. Time for marking..... 431
58. Nature of marking required..... 432
59. Ground must be open to location..... 433
60. End lines of lode claims..... 434
61. Side lines of lode claims..... 434
62. Side-end lines 435
63. Excessive lode locations..... 435

CHAPTER V.

THE EXTRALATERAL RIGHT.

64. Apex 437
65. Dip 438
66. Strike 438
67. The extralateral right—General discussion..... 439
68. The extralateral right under the mining law of 1866 440
69. Parallel end lines under the Act of 1866..... 441
70. Converging end lines under the Act of 1866..... 441
71. Diverging end lines under the Act of 1866..... 443
72. The extralateral right under the Act of 1872..... 443
73. Parallel end lines crossed by the vein..... 443
74. End lines converging in the direction of the dip... 443
75. End lines diverging in the direction of the dip..... 444
76. Vein crossing an end line and a side line..... 445
77. Vein crossing both side lines..... 446
78. Vein crossing the same side line, but neither end line 446
79. Vein crossing one end line and terminating within claim 447
80. Extralateral rights on secondary veins—Secondary veins defined 447
81. Secondary and discovery veins differing in extent and direction 448
82. Broad lodes 449

SECTION PAGE
83. "Jump-over" doctrine 450
84. Junction on the dip..... 450
85. Dip beneath prior patented lands..... 451
86. Continuity, identity and burden of proof..... 451

CHAPTER VI.

THE LOCATION OF PLACERS, TUNNEL RIGHTS AND MILL SITES.

87. Character of placer deposit..... 452
88. Requirements for a placer location..... 453
89. Discovery 454
90. Marking the placer location on the ground..... 454
91. Association placers 456
92. Dummy locators 456
93. Location notices of placer claims..... 457
94. Recorded notices of location..... 457
95. Discovery work 457
96. Conformity to legal subdivisions..... 457
97. Excessive placer locations..... 458
98. Tunnel rights 458
99. Mill sites 460

CHAPTER VII.

AMENDED LOCATIONS—RELOCATIONS AND ANNUAL LABOR.

100. Amended locations 461
101. Relocation 461
102. Nature of and reason for annual labor..... 462
103. Federal statutes 463
104. Time of performance..... 463
105. Character of labor required..... 464
106. Group work 466
107. Annual labor, how valued..... 467
108. Proof of annual labor..... 468
109. Resumption of labor..... 468
110. Forfeiture and abandonment distinguished..... 468
111. Forfeiture to co-owners..... 469

CHAPTER VIII.

MINING PATENT AND APPLICATION FOR PATENT.

SECTION PAGE
112. Nature of title acquired by location..... 470
113. Nature of title acquired by patent..... 470
114. Procedure for obtaining patent..... 471
115. Adverse claim 472
116. Protest 473

CHAPTER IX.

MINING CONTRACTS AND PARTNERSHIPS.

117. Contracts peculiar to mining law..... 474
118. Grubstake contracts 474
119. Options—Working bonds 475
120. Mining leases and licenses..... 475
121. Oil and gas leases..... 476
122. Mining partnerships 477

CHAPTER X.

SPECIAL REMEDIES AND MISCELLANEOUS MATTERS.

123. Injunction 478
124. Inspection and survey..... 478
125. Measure of damages..... 479
126. Statute of Limitations..... 480

Bibliography 480

Quiz Questions:
Law of Descent and Distribution—Wills and Administration—Guardian and Ward..... 481
Law of Landlord and Tenant..... 487
Law of Irrigation and Water Rights..... 491
Law of Mines and Mining..... 503

Leading Illustrative Cases, Table of Contents..... 513

Index 861

LAW OF DESCENT AND DISTRIBUTION WILLS AND ADMINISTRATION GUARDIAN AND WARD

BY

CHARLES S. CUTTING, LL.D.*

INTRODUCTION AND CLASSIFICATION

1. **Classification.**—It is proposed to deal with the subject of this text in three general parts, as follows: I. Descent, II. Wills, III. Probate of Wills and Administration. Generally, it covers the consideration of rights in, management of, control over, and disposition of decedents' estates. When the owner of any property, real or personal, dies, the disposition of such property becomes very important. Theoretically, at the death of the owner and in the absence of any law governing its disposal, the property would revert to the sovereign, being the state in this country. Law, however, provides for its distribution among such individuals as the owner may have designated before his death, and in absence of such designation, to certain of the kin of the owner, designated by law, provided that the creditors of the owner shall first have their claims satisfied out of the estate.

* Member of the Chicago Bar, and of the Illinois Board of Law Examiners. Former judge of the Probate Court of Cook County.

To follow out this idea, the above arrangement of topics or parts is adopted as the readiest and simplest method of exposition. The law contemplates (1) a right and (2) a mode of securing the right. This right, as applied to decedents' estates, is found to vary according to two situations. Of these, the first situation logically to be considered is that where the owner of the property dies without having made provision for the disposal of his property after his death, i. e., he dies intestate (without a will), that being the simpler condition in which to leave the estate; and the other, where he dies leaving a will, i. e., testate, that being the more complex. Having determined the right, the law considers the remedy to be resorted to, to gain the enjoyment of the right, and to that end the law has entered into the proving of wills and the handling of decedents' estates by its courts and officers. This consideration is embraced in the subject of Probate of Wills and Administration. For convenience the law has set apart certain courts, or certain departments of courts, equipped with the machinery of proving wills and handling estates of decedents, called courts of probate or probate divisions or departments, and for convenience, also, these courts or divisions have, generally, been given the supervision of estates of minors and of persons not of sound mind. To conserve the property of these persons, the court appoints guardians, officers of the court, and the persons themselves become wards of the court. Thus the subject of Probate of Wills and Administration properly includes decedents' estates, and the laws

of Guardian and Ward, and will so be considered in this treatise.

2. **Descent.**—In dealing with the Law of Descent, it must be pointed out that the common law rules will be considered almost exclusively. Statutes have made great changes in almost all states so that a particular rule of descent depends upon the particular statutes in each state. The construction of these statutes even now depends very often upon the common law rules; so the important points of those rules are submitted in order to equip the reader with a working foundation from which to proceed in the light of the particular rules of his state. As an example of this operation of the common law, it is to be noted that most states have changed the common law rule of entailment, on the theory that it is incongruous with our present-day conditions to tie up property along a certain line of descent. Thus in Illinois there is a statute,[1] providing that persons who become seized of an estate that at common law would be an estate tail, instead of becoming seized of an estate tail in Illinois, should be held to have a life estate only, "and the remainder shall pass in fee simple absolute to the person or persons to whom the estate tail would, on death of the first grantee" (the life tenant) "first pass, according to the course of the common law." The course of the common law, thus, becomes important, and for that, reference must be had to the common law rules of descent.

[1] Hurd, Rev. Statutes of Ill., 1911, chap. 30, p. 523, § 6. See subject, REAL PROPERTY.

3. **Wills.**—The treatment of Wills, herein, will omit in large measure all questions dealing with the nature of the estate that passes by the will, whether the will conflicts with the rule against perpetuities, or whether the rule in Shelley's Case applies; as it is considered that those matters are most properly dealt with under the subject of Real Property. The treatment of Wills, therefore, is to be confined to the consideration of matters having to do with the construction and execution of wills, and the operation of extrinsic influences thereon, wholly apart from the inquiry as to whether a certain clause in a will gives a life estate, or a fee, a vested remainder, or a contingent one; whether a gift is to a class or to individuals, and kindred topics, all of which belong more properly to the subject of Real Property.

4. **Administration.**—This topic deals essentially with the procedure to be followed in dealing with the goods of the deceased. As the procedure leading up to Probate of Wills, or the bringing of the estates into court, is also largely statutory, little time will be devoted to that. However, incidentally the powers of executors and administrators and their duties will be treated, and here also many of the common law rules are still in force. The rules governing trustees will not be followed out to any extent, but the subject of Trusts is referred to for that topic.

5. **Minors' estates.**—This topic will be treated under the head of Guardian and Ward, and will include the nature of the relationship, the mode of appointment of the guardian, his powers and duties.

PART I

DESCENT AND DISTRIBUTION

CHAPTER I.

DESCENT.

6. **Defined.**—The rules of descent apply to the disposition of the real estate of one who dies intestate, that is, without a will.

7. **Historical.**—The common law rules of descent are now practically historical, statutes throughout the United States having changed the common law wholly beyond recognition.

8. **Common law.**—The common law observed certain strict rules of descent, derived no doubt from the policy of the feudal law to have always someone as owner of property who could render his feudal dues to the overlord. These rules of descent are epitomized in what are known as the Canons of Descent, as follows:

1. Inheritances shall lineally descend to the issue of the person who last died actually seized in infinitum, that is, indefinitely, but shall never lineally ascend.

2. The male issue shall be admitted before the female.

3. Where there are two or more males in equal

degree, the eldest only shall inherit, but the females all together.

4. The lineal descendants, in infinitum, of any person deceased shall represent their ancestor, that is, shall stand in the same place as the person himself would stand, if he were living.

5. On failure of lineal descendants, or issue, of the person last seized, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.

6. The collateral heir of the person last seized must be his next collateral kinsman of the whole blood.

7. In collateral inheritances, the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near); unless where the lands have, in fact, descended from a female.

It must be borne in mind that, under the old common law, wills of real estate were not known, in fact, were not permitted, so that questions of testacy and intestacy did not concern real estate. After it became possible to will real estate, the laws of descent did not operate, of course, where the will designated the person to whom the land should go.

9. **Descent only as to real property.**—It must be observed also, that descent applied only to real estate. Personal property was governed by rules of distribution, which will be considered hereinafter. Under the old common law, personal property of deceased persons was administered in the ecclesi-

astical courts, and wills of personal property were known at a very early date.

10. **The canons.**—It is well to examine, then, these canons of descent more carefully, with a view to inquiring particularly what the rules there evolved really signify.

11. **How property descended.**—Before going into a consideration of each individual canon, it might be well to give a general outline of how property descended. It appears that the first descendants at common law were the children, then the children's children, and the children's children's children, and so on down, but even of these, the first to inherit were the boys; of those the eldest took first, and if he was dead, the next oldest, and so on. In case there were no male children, the inquiry was, were there any male descendants of male children? If it appeared there were none, the inquiry was directed to the female children, but here it was not the eldest that took, but all took equally. The feudal law, it is thus seen, had its first regard for the males.

Suppose now that there were no children or children's children, or descendants thereof: the property then went to the brothers, and if no brothers, to the sisters; but of the brothers, it would go to the eldest first; if the deceased was the middle one of three brothers, it would go to the eldest first and to the youngest next, and even if the deceased was the youngest, it would go to the eldest first.[2] If there were no brothers, it would go to the sisters equally. If there were no issue and no brothers or

[2] Lit., § 5 (Eng.).

sisters, the property would go to the collaterals, such as uncles and aunts, and cousins.

12. **Canon No. 1.**—If a son died without issue (i. e., children or children's children), leaving a father living and also an uncle, his property went not to the father, though the father was nearest in blood, but to the uncle.[3] That was because the property could not ascend, the feudal law finding it inadvisable to permit property to go from the offspring to the parents.

13. **Canon No. 2.**—So if a son died without issue, leaving two uncles, one on his mother's side and one on his father's side, the one on the father's side would inherit all and the one on the mother's side nothing; if there were no uncles or male cousins on the father's side, the property would go to the mother's side. This, however, was true only of such lands as the son acquired by purchase, for if he inherited land from the father and died without issue, and he had no brothers and sisters, and no uncles or male cousins on the father's side, but an uncle on the mother's side, the uncle on the mother's side could not take, but the land would escheat, that is, go to the lord of the manor.[4] So also if the son inherited from the mother and he had an uncle on the father's side, that uncle could not take, but the land would go to the uncle or cousin on the mother's side, and if there were no heirs on the mother's side the land would escheat.[5]

14. **Canon No. 3.**—This canon has been explained above. The sisters take equally if there are no

[3] Lit., § 3 (Eng.).
[4] See ESCHEAT, § 24.
[5] Lit., § 4 (Eng.).

brothers, or the aunts if there are no uncles, and so on.

15. **Canon No. 4.**—Suppose that property was to descend to lineal females of whom there were, say, three in equal degree, three sisters, A, B and C, of whom, however, two, A and B, died before the decedent from whom the descent is sought to be cast, and of the two sisters dying, A left only one child and the other, B, left three children. There would thus be the one child of A, the three children of B, and the surviving sister, C, all claiming. The property would still be divided into three parts instead of five, and the sole child of A would get one-third, the three children of B would get another third, and C would get the remaining third.

16. **Canon No. 5.**—This canon finds explanation in the above, except as to the meaning of "blood of the first purchaser." The inquiry then arises, what does this mean?

First Purchaser. It has been shown that where property was inherited by a son from the father, and the son died, the children or issue of the son took, but that if the son died without issue, it would go to his brothers and sisters. If he died without brothers and sisters it would go to his collateral heirs, say his uncles or aunts, or his cousins. It has been shown, also, that if the property was bought by the son, it would go first to the uncles on the paternal side, and then to those on the maternal side, and then to all the aunts. In such case they would all be the collateral heirs of the "blood of the first purchaser," to wit, the son. However, if the

property was merely inherited by the son from the father, who purchased it, and the son died without issue or brothers or sisters, it would never go to the uncles or aunts on the mother's side, for in that case the "first purchaser" would be the father, and the uncles and aunts on the mother's side would not be considered of the "blood of the first purchaser."

17. **One who takes by will a purchaser.**—Under the old common law, a purchaser was one who took by conveyance, either by gift or for valuable consideration. Later, when wills concerning real estate were recognized, one who acquired property by will was also a "purchaser";[6] so that it was not necessary to have paid money or consideration in order to be a purchaser, so long as the property was not acquired by descent.

18. **Canon No. 6.**—The common law distinguished between half brothers and sisters, and brothers and sisters of the whole blood. One could not inherit from his half brother. Thus if a man had two sons, one by a first wife and the other by a second wife, and the eldest of the two sons obtained land by purchase and died, the property would go neither to the half brother nor to the father, but would go to the uncle or cousin of the deceased son, on the father's side. But if the first wife had a daughter also, the property would go to the sister.[7] Suppose that the uncle on the father's side inherited and made entry and then died without issue and without brothers or sisters. The property would then descend to the sec-

[6] Opel v. Shoup, 100 Iowa 407, LEADING ILLUSTRATIVE CASES.
[7] Lit., §§ 6 and 7 (Eng.).

ond son, the half brother of the eldest child, because as to the uncle on the father's side, the second son is of the full blood.[8]

Suppose, however, in the situation above mentioned, the father died and his lands descended to the eldest son, and after the son made entry, he also died. The property would not go to the half brother, but would it go to the sister? That brings us to the last canon.

19. **Canon No. 7.**—Under this canon it appears that the property would go to the uncles or cousins on the father's side, for property that comes from the father descends according to the father's line, just as property from the mother goes to the mother's line.

20. **Who last died actually seized.**—There are some additional points important to be considered in connection with descent. It is to be noted that Canon 1 provides that inheritances shall descend to the issue of the person who last died "actually seized." In § 18 in the illustration to explain the rule of descent under Canons 6 and 7, a hypothetical case was considered where the father died and his lands descended to the eldest son and where the eldest son "made entry." Suppose that the eldest son had died without making entry. The property would then have gone to the second son, being half brother to the eldest son. What is the reason for that, then, and what is meant by entry?

21. **Last seized.**—The common law required that in order for property to descend from a person it

[8] Lit., § 8 (Eng.).

must appear either (1) that the person had obtained the property by purchase, or (2) if he obtained it by descent, that he was seized of the property at the time of his death. Property was not considered as passing by descent until the descendant took possession, and the act of taking possession was called entry.

22. **Entry.**—There were various ways of making entry. A physical entry was of course sufficient. However, an entry might be made by placing a tenant upon the land, or, where a tenant was already upon the land, it was considered that upon the death of the ancestor, the possession of the tenant at once inured to the benefit of the heir without his making any entry, or in fact, taking any steps to assert his right. Thus, under the old common law, an heir who inherited property from the ancestor was liable for the ancestor's debts, if he made entry upon the lands, i. e., if he accepted the inheritance by taking possession. Thus where at the time of the ancestor's death, a tenant was in possession, the heirs were held to be seized and liable for the debts. And this rule obtained notwithstanding the tenant after the death of the ancestor thought and recognized somebody else as the owner, and paid the rent to such other person.[9]

23. **Rule now changed.**—The rule has now changed, however, throughout this country, and land here invariably descends from the person "last entitled" instead of "last seized."[10] Where, however,

[9] Bushby v. Dixon, 3 B. & C. 298 (Eng.).
[10] North v. Graham, 235 Ill. 178.

the statute of a state expressly provides that descent should be cast according to the rules of the common law, possibly the old rule of descent from the person "last seized" still obtains, as under the Illinois statute on entails, mentioned in § 2.

24. **Escheat.**—It was stated above, that in a case where one died without issue, and without brothers or sisters, property that had descended to him from the father's side would go to the uncles or cousins. Attention was called, also, to the rule that if there were no uncles or cousins, the property would escheat. The question then arises, what is escheat?

Where a person died without heirs, the common law gave his property to the overlord. Under the feudal law, someone was required at all times to stand ready to render the feudal dues to the overlord to the extent required of the particular estate held of such feudal lord. Upon failure of an undertenant, it became necessary on that account to give the overlord the power to vest in a new tenant, and for that purpose, where heirs failed, the property escheated to the lord and he might then re-convey. In our country escheat sometimes occurs. Persons may still die without heirs. Here, however, the property escheats to the state, for the state is the sovereign here.

25. **Forfeiture and reversion.**—There were many ways in which land could revert to the overlord, other than by failure of heirs. Thus land might be forfeited by attainder; by defect of blood, as in case of bastardy; or where the heirs were all aliens. So, and this is true even at the present day in some

states, where a charitable corporation breaks up, the property escheats to the lord, or in this country, to the state.[11] One state in this country, however, adheres to a contrary rule, and considers that the property in such case should go to the original donors or their heirs, namely, those who had originally contributed the property to the charitable organization.[12]

26. **Lineal and collateral.**—Explanation should be made of the terms "lineal" and "collateral" employed so generally in the canons of descent hereinbefore quoted and referred to.

Consanguinity, or kindred, is defined by Blackstone as "the connection or relation of persons descended from the same stock or common ancestor."[13] Consanguinity is of two kinds:—(1) Lineal; (2) Collateral.

Lineal consanguinity is that existing between persons of whom one is descended in a direct line from the other. Where the descent is from the same stock or ancestor, but not in a direct line, the kindred are collateral.

A

B C

D E

G F

Thus in the illustration, A-C-E-F and A-B-D-G are lineally related or descended, while C-B, C-D, C-G, E-B, etc., are collaterally related.

[11] Johnson v. Norway, Winch. 37 (Eng.).

[12] Life Ass'n v. Fassett, 102 Ill. 315; Mott v. Danville Sem., 129 Ill. 403; Presbyterian Church v. Venable, 159 Ill. 215.

[13] 2 Blackstone, Commentaries, p. 202.

In computing the degrees of relationship or consanguinity, each generation counts as one degree. In estimating the degrees of lineal consanguinity, the civil, the canon, and the common law follow the same plan, that is, each generation is one degree. Thus in the illustration F is lineally three degrees from A.

In estimating collateral consanguinity, the common law and canon law began with the common ancestor and counted down to the claimant, and in whatever degree the claimant is distant from the common ancestor that is the degree in which he is related to the intestate. The civil law counted upward from the intestate to the common ancestor and then downward from him to the person in question, reckoning one degree for each step or generation, and the total number of steps indicated the degree of the relationship.[14]

Most of the states have adopted the rule of the civil law in computing the degrees of consanguinity.[15]

At the common law an alien could not take real property by descent, but this rule is quite generally changed by the statutes of the several states.

A person who murders the intestate, cannot acquire his property by inheritance, but such act does not destroy the inheritable quality of his blood.[16]

Upon the death of the intestate, his real property is usually deemed to vest at once in his heirs by operation of law, without any order or decree of court, though it may be subject to contribute to the

[14] 2 Blackstone, Commentaries, pp. 206, 207, note.
[15] Cooley, Blackstone's Commentaries, vol. II, p. 207, note.
[16] Deen v. Millican, 6 Ohio C. C. 357.

payment of debts in case of an insufficiency of personal property.[17]

27. **Who is heir at common law?**—Thus it is seen that at common law, the "heir" was the relative next in the order of descent, or the nearest collateral relative. Neither a husband nor a wife nor a bastard could be heir.

28. **Under statute—Widow.**—Statutes have, however, changed the rule. Where, at common law, a wife had her dower right in the deceased husband's real estate, and her widow's award out of his personalty, and nothing more, statutes now invariably make her an heir of the husband to part or all of his estate where he dies without issue surviving him. The question, then, what standing a widow has under such statutes often arises where a will gives property to "my heirs." Does the widow come within such a designation? Doubtless she does. Thus a will that gave property to my "right heirs," was held to include the widow in that term where the statute made her an "heir" of her husband.[18]

29. **Legitimated children.**—The same situation is often encountered where the statute provides, in the case of illegitimate children, that the subsequent marriage of their parents shall legitimate them. That was not true at common law. Would then such an act make a legitimated child an heir within the meaning of that term appearing in a will? It seems that it would.[19]

[17] Overturf v. Dugan, 29 Ohio St. 230.
[18] Peabody v. Cook, 201 Mass. 218.
[19] In re Wardell's Estate, 57 Cal. 484.

CHAPTER II.

DISTRIBUTION.

30. **Definition.**—Rules of descent apply to real estate and not to personal property. Rules of distribution apply to personal property and not to real estate.

31. **In general—Provisions of the Statute of Distribution.**—Unlike the real estate, the personal property of the intestate does not descend at once to the heirs. At the death of an individual, the personal property does not belong to the kin of the deceased, but is charged with the payment of his debts. With the view of seeing to its application for this purpose the courts take charge of it, and appoint an officer of the court to administer upon it. This person theoretically takes the place of the deceased and is called his personal representative or administrator.

The administrator is charged with the duty, first, of payment of the debts, and then, with the duty of distributing the remainder according to the Statute of Distribution prevailing in the jurisdiction of the domicile of the owner at the time of his death.

The persons entitled to take under the statutes of descent and those entitled to take under the Statutes of Distribution are often, but not necessarily, the same. And under most of such statutes the sur-

viving husband or wife is given a greater share in the personal than in the real estate.[20]

The distribution of the personalty is usually postponed until the final settlement of the estate. But in many states, provision is made for an earlier distribution, in whole or in part, if refunding bonds are given by the distributees to provide for the return of the property distributed, or its value, in case it becomes necessary to pay demands upon it.

In most cases, and regularly, a decree of distribution is made by the proper court, which decree determines the persons entitled to share and the respective proportions which each is to take. But the personal representative often takes the risk of distributing the personalty without such a decree.

The right of a distributee to his share is usually deemed to be vested at the time of the death of the intestate, though his right to possession, the amount of his share, and the specific property to be assigned to him are not fixed until the decree of distribution.

If a distributee dies, pending distribution, his share will be payable to his personal representatives. And a distributee may assign his interest, pending distribution, in which case his share will be paid to his assignee.

Debts due from a distributee to the deceased will be deducted from his share, and so will advancements, made to him by the deceased in his lifetime.[21]

The distributee may maintain an action against the personal representative of the intestate to re-

[20] See typical statute, p. 19.

[21] Dittoe's Admr. v. Cluney's Exrs., 22 Ohio St. 436; Parsons v. Parsons, 52 Ohio St. 470.

cover his distributive share, after a decree of distribution has been made and is uncomplied with. But in many states a summary remedy is provided by statute and may be used in such cases to compel the personal representative to distribute the estate.

TYPICAL STATUTE ON DESCENT AND DISTRIBUTION.

Illinois Revised Statutes, 1911. Chapter 39.

§ 1. Be it enacted * * * That estates, both real and personal, of residents and non-resident proprietors in this state dying intestate, or whose estates or any part thereof shall be deemed and taken as intestate estate, after all just debts and claims against such estates are fully paid, shall descend to and be distributed in manner following, to-wit:

First.—To his or her children and their descendants, in equal parts; the descendants of the deceased child or grandchild taking the share of their deceased parents in equal parts among them.

Second.—When there is no child of the intestate, nor descendant of such child, and no widow or surviving husband, then to the parents, brothers, and sisters of the deceased, and their descendants, in equal parts among them, allowing to each of the parents, if living, a child's part, or to the survivor of them if one be dead, a double portion; and if there is no parent living, then to the brothers and sisters of the intestate, and their descendants.

Third.—When there is a widow or surviving husband, and no child or children, or descendants of a child or children of the intestate, then (after the payment of all just debts) one-half of the real estate and the whole of the personal estate shall descend to such widow or surviving husband as an absolute

estate forever, and the other half of the real estate shall descend as in other cases, where there is no child or children or descendants of a child or children.

Fourth.—When there is a widow or a surviving husband, and also a child or children or descendants of such child or children of the intestate, the widow or surviving husband shall receive, as his or her absolute personal estate, one-third of all the personal estate of the intestate.

Fifth.—If there is no child of the intestate or descendant of such child, and no parent, brother or sister, or descendant of such parent, brother or sister, and no widow or surviving husband, then such estate shall descend in equal parts to the next of kin to the intestate in equal degree (computing by the rules of the civil law), and there shall be no representation among collaterals, except with the descendants of brothers and sisters of the intestate; and in no case shall there be any distinction between the kindred of the whole and the half blood.

Sixth.—If any intestate leaves a widow or surviving husband and no kindred, his or her estate shall descend to such widow or surviving husband.

Seventh.—If the intestate leaves no kindred, and no widow or husband, his or her estate shall escheat to and vest in the county in which said real or personal estate, or the greater portion thereof is situated.

§ 2. An illegitimate child shall be heir of its mother and any maternal ancestor, and of any person from whom its mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person, and take, by descent, any estate which the parent would have taken, if living.

Second.—The estate, real and personal, of an illegitimate person shall descend to and vest in the

widow or surviving husband and children as the estate of other persons in like cases.

Third.—In case of the death of an illegitimate intestate leaving no child or descendant of a child, the whole estate, personal and real, shall descend to and absolutely vest in the widow or surviving husband.

Fourth.—When there is no widow or surviving husband, and no child or descendants of a child, the estate of such person shall descend to and vest in the mother and her children, and their descendants —one half to the mother, and the other half to be equally divided between her children and their descendants, the descendants of a child taking the share of their deceased parent or ancestor.

Fifth.—In case there is no heir as above provided, the estate of such person shall descend to and vest in the next of kin to the mother of such intestate, according to the rule of the civil law.

Sixth.—When there are no heirs or kindred, the estate of such person shall escheat to the state, and not otherwise.

§ 3. An illegitimate child, whose parents have intermarried, and whose father has acknowledged him or her as his child, shall be considered legitimate.

§ 4. Any real or personal estate given by an intestate in his lifetime as an advancement to any child or lineal descendant shall be considered as part of the intestate's estate, so far as it regards the divisions and distribution thereof among his issue, and shall be taken by such child or other descendant towards his share of the intestate's estate, but he shall not be required to refund any part thereof, although it exceeds his share.

§ 5. If such advancement is made in real estate, and the value thereof is expressed in the conveyance or in the charge thereof made by the intestate, or in

the written acknowledgment thereof by the party receiving it, it shall be considered as of that value in the divisions and distribution of the estate; otherwise, it shall be estimated according to its value when given.

§ 6. If such advancement is made in personal estate of the intestate, the value thereof to be estimated the same as that of real estate; and if, in either case, it exceeds the share of real or personal estate, respectively, that would have come to the heir so advanced, he shall not refund any part of it, but shall receive so much less of the other part of the intestate's estate as will make his whole share equal to the shares of other heirs who are in the same degree with him.

§ 7. No gift or grant shall be deemed to have been made in advancement unless so expressed in writing or charged in writing, by the intestate, as an advancement, or acknowledged in writing by the child or other descendant.

§ 8. If a child or other descendant so advanced, dies before the intestate, leaving issue, the advancement shall be taken into consideration in the division or distribution of the estate of the intestate, and the amount thereof shall be allowed accordingly by the representatives of the heirs so advanced, as so much received, towards their share of the estate, in like manner as if the advancement had been made directly to them.

§ 9. A posthumous child of an intestate shall receive its just proportion of its ancestor's estate, in all respects, as if he had been born in the lifetime of the father.

§ 10. If, after making a last will and testament, a child shall be born to any testator, and no provision be made in such will for such child, the will shall not on that account be revoked; but unless it

shall appear by such will that it was the intention of the testator to disinherit such child, the devises and legacies by such will granted and given, shall be abated in equal proportions to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of such testator if he had died intestate, and a marriage shall be deemed a revocation of a prior will.

§ 11. Whenever a devisee or legatee in any last will and testament, being a child or grandchild of the testator, shall die before such testator, and no provision shall be made for such contingency, the issue, if any there be, of such devisee or legatee shall take the estate devised or bequeathed as the devisee or legatee would have done had he survived the testator, and if there be no such issue at the time of the death of such testator, the estate disposed of by such devise or legacy shall be considered and treated in all respects as intestate estate.

§ 12. All such estate, both real and personal, as is not devised or bequeathed in the last will and testament of any person, shall be distributed in the same manner as the estate of an intestate; but in all such cases the executor or executors, administrator or administrators, with the will annexed, shall have the preference in administering on the same.

32. **Statutes of distribution and the common law.** —Under the early common law the administrator was entitled to the balance of the personal estate after payment of debts, i.e., to the residue, as his own. Statutes, early, changed this rule and provided that the residue of such property, if not disposed of by will, should go to the next of kin, who were the kin or relations of the deceased nearest to him in degree of relationship. Later statutes went further and

pointed out who the persons entitled to share in the distribution should be, and the modern statutes, of which the above is a fair example, make no distinction between those entitled as heirs and those entitled as next of kin or distributees of personal estate.

33. **The Illinois statute examined.**—Examination of the statute above set forth discloses the general scheme of distribution. The various sections are self-explanatory, but attention is called to the rule that there shall be representation among brothers and sisters. By this is meant that if A dies leaving one brother who has three children, and had a brother and a sister, both of whom died before A, the brother leaving one child and the sister, four children, all of whom are alive at A's death, A's property will be divided into three shares, and the deceased brother's child will get one of the shares, the deceased sister's children will divide another share among them, and the living brother will get the third share. Suppose, now, that A had no brothers or sisters or descendants of brothers or sisters, but that he had three cousins, of whom one had one child, a second three children and the third, four children. Suppose that the cousins died before A, but that the children all survived him, so that at A's death, his next of kin were the one child of the one cousin, the three children of the other cousin, and the four of the last. If the rule of representation applied here as well, the property would be divided into three parts, and the one child of the one cousin would get one-third of A's property, each of the three

children of the other would get one-ninth each, and each of the four children of the last cousin would get one-twelfth each. However, they do not take by representation but per capita (by the head)—only brothers and sisters take by representation, i. e., per stirpes (through the root)—and therefore each of the children of the three cousins would get one-eighth.

Another provision in the Illinois statute that requires comment is the provision in the fifth paragraph of section 1 that under certain conditions the property shall descend according to the rule of the civil law. Explanation of the distinction between the civil rule of counting descent and the canon rule is found above in § 26.

PART II

WILLS AND ADMINISTRATION

DIVISION I

HISTORY AND NATURE IN GENERAL

CHAPTER III.

WILLS DEFINED.

34. **Definitions.**—A "Will" or "Last Will and Testament," is a solemn disposition of one's property in the form prescribed by law, which, though made while living, does not take effect until the death of the maker.[22]

Blackstone's definition of a will, "the legal declaration of a man's intentions, which he wills to be performed after his death," is derived from that of the old Roman writers; and he says it is called a "will" in England because "its efficacy depends on its declaring the testator's intentions."[23]

The word "will," in its popular meaning, now in-

[22] "A will is an instrument by which a person makes a disposition of his property, to take effect after his decease, and which, in its own nature, is ambulatory and revocable during his life. It is this ambulatory quality which forms the characteristic of wills; for, though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, yet the postponement is in such case produced by the express terms, and does not result from the nature of the instrument." McDaniel v. Johns, 45 Miss. 632; 1 Jarman, Wills (5th Amer. ed.), p. 16.

[23] 2 Blackstone, Commentaries, p. 500.

cludes the disposition of both real and personal property, though in its technical and historical sense, it designated an instrument disposing of realty only.[24]

A person making a will is called the "testator" when a man, and the "testatrix" when a woman. One who dies leaving a will disposing of his property is said to die "testate"; if without a will, "intestate."

The granting words usually employed in a will are "give," "devise," and "bequeath." Of these the word "give" is the most comprehensive and may be used in reference to the transfer of any sort of property.

"Devise" is appropriately used in connection with real property, and "bequeath" when the will is of personal property. Likewise the word "devise," when used as a noun, signifies, when correctly used, a disposition of realty, and "bequest," of personalty.

[24] "A will, or last will and testament, is a solemn act or instrument whereby a person declares his mind and intention as to the disposal of his lands, goods or effects, and what he would have done after his death."—2 Co. Lit., chap. 10. "And the common law calls that a *will* where lands or tenements are given; and where it concerns goods and chattels alone, it is termed a *testament*."—Ibid.

"A will is a legal declaration of a person's intentions, to take effect after his death. The essential difference between a will and any other instrument or provision contingent upon death is that a will has no effect whatever until death, and may be freely revoked meanwhile; but a deed which may create or convey an estate in the event of death must take effect as binding the grantor in his lifetime. In English law the word *will* was originally used only of a disposition of *real* property to take effect after death; the word *testament* being then used, as in the Roman and civil law, of a disposition of *personal* property; hence the phrase, now redundant, *last will and testament*. In modern usage the term *will* does not necessarily imply an actual disposition of property; for, an instrument, executed with the formalities required by law, in which the testator merely appoints a guardian for his child, or merely nominates an executor, leaving the assets to be distributed by the executor among those who would take by law, is a will." Century Dictionary, "Will."

"Legacy" is a word used to designate the gift of a sum of money. However, the technical, or real meaning of these words, is not so strict but that a gift will prevail, although the testator does not use them correctly. Thus a "bequest" may include both realty and personalty.[25] And a "devise" will prevail, although miscalled a "bequest."[26]

The word "testator" is the common designation of a person making either a will or testament; while "devisor" is the correct name for one who makes a will, but the term is little used.

"Devisee" is the proper and legal word used to denote one to whom realty passes by will; while "legatee" is properly used in naming one to whom personalty passes by will. These words, however, are frequently interchanged in their usage.

35. **Same subject—Written and unwritten wills.** —Wills are of two kinds: (1) Written. (2) Unwritten, or nuncupative.

A written will, as the name suggests, is one in writing. When such a will is entirely written by the testator himself it is called a holograph, spelled also ograph. These holographic wills are made valid by statute in some of the states without the formalities of attestation required of other wills.[27]

Unwritten, or nuncupative, wills are usually valid only where the testator was overtaken by sudden illness and had no time to make a written will. By statute in the various states, and in England, the power to make a nuncupative will is quite generally

[25] Evans v. Price, 118 Ill. 593.

[26] In re White, 125 N. Y. 544.

[27] 3 Jarman, Wills (5th Amer. ed.), p. 767, note.

restricted to soldiers in service and sailors upon a voyage, who are only allowed to dispose of personal estate in this manner, and that usually only to the extent of a few hundred dollars, the reason being the great hazards attending the correct reporting of wills so made.[28]

36. **Same subject—Codicil defined.**—A codicil is a supplement, or addition, to a will, made after the will and designed to alter or add to it. It may or may not be a separate instrument.[29]

37. **Same subject—A will distinguished from a gift.**—A will differs from a gift in this respect: it is not intended to operate or take effect until the

[28] Prince v. Hazleton, 20 Johns. 502 (N. Y.); Cooley's Blackstone, vol. II, p. 501, note.

The following is an example of a statutory provision covering a nuncupative will: Illinois Revised Statutes, 1911, Chapter 145, Page 2379, § 15. A nuncupative will shall be good and available in law for the conveyance of personal property thereby bequeathed, if committed to writing within twenty days after the making thereof, and proven before the county court by two or more credible, disinterested witnesses, who were present at the speaking and publishing thereof, who shall declare, on oath or affirmation, that they were present and heard the testator pronounce the said words, and that they believed him to be of sound mind and memory; and that he or she did at the same time desire the persons present, or some of them, to bear witness that such was his or her will, or words to that effect; and that such will was made in the time of the last sickness of the testator or testatrix; and it being also proven by two disinterested witnesses, other than those hereinbefore mentioned, that the said will was committed to writing within ten days after the death of the testator or testatrix; and no proof of fraud, compulsion or other improper conduct be exhibited, which, in the opinion of said court, shall be sufficient to invalidate or destroy the same; and all such wills, when proved and authenticated as aforesaid, shall be recorded in like manner as other wills are directed to be recorded by this act: *Provided*, that no letters testamentary shall be granted on such will, until the expiration of sixty days after the death of the testator or testatrix.

[29] "Codicil, a supplement or addition to a will. It may change the dispositions of the will, or even revoke some of them, but does not revoke the entire will. The term codicil implies that the will, as modified by the codicil, stands."—Abbott's Law Dictionary.

death of the testator, no title of any kind vests in those who take under it until that time, and it is subject to revocation at any time before the testator's death. A gift, on the other hand, must take effect in the present.

Gifts are of two kinds: (1) Gifts inter vivos, (2) Gifts causa mortis.

By a gift inter vivos, that is, between the living, is meant a gift in the ordinary sense of the word; while gifts causa mortis are those made in contemplation of immediate death, and which become invalid if the person making the gift recovers. In either case, however, to make a gift valid a present title must vest in the donee.

To constitute a valid donatio causa mortis, it is not only essential that delivery to the donee shall be complete during the donor's life, but the donee must also take and retain possession until after the donor's death. Then in case the donor dies, the gift becomes complete; if he recovers, the title reverts to him.[30]

[30] Appeal of Walsh, 122 Pa. St. 177; 9 Am. St. Rep. 83.

Donatio mortis causa.—"A gift in expectation of death, a gift of personal property made by a person in contemplation of his own death by delivery of the property to another to keep as his own in case of the donor's decease. The subject of such a gift can be personal property only; and, to constitute a valid *donatio mortis causa*, it must be made in actual peril of the death, and to take effect only in case of the death of the donor, and there must be an actual delivery of the property, or for the use of the donee, if such delivery can be made, according to the manner in which it is capable of being delivered. The gift is conditional, dependent upon the contingency of expected death, and is revocable during the life of the donor, therein differing from a gift *inter vivos*. It differs from a legacy in that it does not require any proceeding in the court of probate, or any assent or action on the part of the executor, to perfect the title of the donee."—Abbott's Law Dictionary.

CHAPTER IV.

ORIGIN, HISTORY AND NATURE OF WILLS.

38. **Origin of wills coincident with the rise of private property.**—Among very primitive peoples there was neither personal property nor realty in the hands of the individual and consequently there could be no subject matter for wills. With the development of property rights in the individual came also the custom or privilege, sanctioned by the public sentiment of the community, of allowing the owner to designate who should succeed to his holdings, and also a general rule indicating who should take the property of a deceased person when he failed to dispose of it himself. These rules or customs were not always the same, and varied according to the theory of descent prevailing in the community where they had their origin.

In nearly all primitive nations property belonged to the community as a whole, and the right of the individual was to use, but not to segregate it, though later, and by degrees, the right of the individual to the lands surrounding his own habitation became recognized.[31]

Wills are thus of very ancient origin, their use and legal sanction having been well known to the Greeks and Romans. In England at the time of

[31] Page, Wills (1st ed.), p. 5.

the Norman Conquest, wills of both real and personal property were common. In the Roman law the will, though originally a public and irrevocable act, had come, prior to the time of Justinian's Code, to have a striking similarity in its elements and effects to the modern will.

39. **The status of the will in England prior to 1066.**—Prior to the Norman Conquest, A. D. 1066, the Anglo-Saxon law recognized the right of the owner to will both personal and real property, although some authorities seem to think that this right was not general, but confined only to great personages, as the king, bishops, earldormen and the like.[32] It is quite possible that only such persons had property sufficient to warrant the trouble of making a will. There is some doubt also whether this pre-Norman will was revocable or not, after being made.[33]

40. **The status of the will after 1066 A. D.**—The Conquest of England by the Normans in 1066 A. D., and the introduction of the feudal system, or the theory that all land belonged to the king and was leased or rented out by him to his head men upon their rendering military services,—naturally put an end to the disposition of land by will, as the two theories were incompatible.

The will, however, did not give place to the theory of the feudal system without a struggle, and though the common law held that land could not be trans-

[32] Pollock and Maitland, History of English Law, vol. II, p. 318; Page, Wills (1st ed.), p. 7.

[33] Pollock and Maitland, History of English Law, vol. II, pp. 318-319.

ferred by will, there were, in Kent and some other boroughs and manors, exceptions to the general rule, and in these places lands could be devised. Personal property remained free to be disposed of by will, and an estate for years, being considered as personalty, could be disposed of by will.[34] Real estate, however, could not be so disposed of.

In 1285, the Statute De Donis[35] was passed, making the conditions in the deed or grant of the donor obligatory, and it was thought that where the word "devisee" was used in a deed of lands, such lands could thereafter be disposed of by will. But the courts held otherwise.[36]

41. **The attempt of the courts of equity to revive the right to will lands.**—In the fourteenth and fifteenth centuries the courts of equity in England undertook to modify the common law rule forbidding the disposition of lands by will. They did it in this way: the conveyancers had invented a plan by which the owner of land could deed it to a grantee to hold to the grantor's use, or to the use of any other person he might designate, and the equity courts would enforce the conditions of this grant; so when the grantor undertook to appoint to this use by will, the equity courts continued to uphold and enforce the use, thus practically making land, or its benefits, devisable.

In 1535, Parliament attempted to put an end to this roundabout method of devising land, through

[34] 2 Blackstone, Commentaries, p. 375.
[35] 13 Ed. I, Stat. I.
[36] Pollock and Maitland, History of English Law, vol. II, p. 27.

the doctrine of uses, by passing what is known as the Statute of Uses.[37] The Statute of Uses provided in effect that the "seisin," or title, should follow the use and that the person taking the use should, in law, take the entire legal title. So when the grantor devised to his own use, he still held the legal title; and when he devised to the use of a third person, such person was thereby put into possession of the full legal estate.

This statute would have put an end to the devising of lands in England, had not the equity courts, in their attempt to outwit Parliament and the common law, devised a new expedient. The method used was to interpose a second trust, that is, lands were deeded to A for the use of B in trust for C, and the equity courts simply upheld C's beneficiary interest, and allowed such an interest to be created by will.[38]

42. **The Statute of Wills.**—In 1540, just five years after the passage of the Statute of Uses, Parliament passed the Statute of Wills,[39] which was followed in 1542-43 by an act to interpret the Statute of Wills.[40] The purpose and effect of these two acts was to remove the restriction upon the devise of land at common law; under these statutes persons holding lands in fee simple, or in socage tenure, were enabled to devise the same at their will and pleasure, except to bodies corporate; and those who held estates by the tenure of chivalry were enabled to devise two-

[37] 27 Hen. VIII, chap. 10.

[38] 2 Blackstone, Commentaries, pp. 375, 376; see also subject, REAL PROPERTY.

[39] 32 Hen. VIII, chap. 1.

[40] 34-35 Hen. VIII, chap. 5.

thirds thereof.[41] The Statute of Wills, 34-35 Henry VIII, declared "wills or testaments made of any manor, lands, tenements or other hereditaments, by any woman covert, or person within the age of twenty-one, idiot, or by any person *de non sane* memory, shall not be taken to be good or effectual in law."

From 1652 to 1659, under Cromwell, the feudal theories pertaining to the tenure of lands in England were disregarded, and after the Restoration of the monarchy, could not be revived, and nearly all lands thus came to be held by their possessors in fee simple.

The feudal system did not affect the disposition of personal property by will, and all through the Norman period the right to make testamentary bequests prevailed. But in some parts of England, if not in the whole country, about the end of the twelfth century, the testator could only dispose of the whole of his personal property by testament in case he left neither wife nor children; otherwise he could dispose of but a third of his personal property. One-third went to his wife, and was known as the "wife's part," one-third to his children, and known as the "child's part," or "bairn's part." In case he left only wife or children, he could dispose of one-half his property, the other half going to his wife or children.[42] This limitation upon the power of the testator came to be known as the doctrine of reasonable parts.

[41] "The effect of these two acts was to enable all persons except feme coverts, infants, idiots and persons of non-sane mind and memory to devise by will and testament, in writing, two-thirds of their land held by Knight's services and all lands held by socage tenure. The beneficiary could not be a corporation by the terms of these statutes."—Page, Wills (1st ed.), § 13.

[42] 2 Blackstone, Commentaries, p. 492.

This limitation on the power of the testator soon faded away, and by 1625, in the beginning of the reign of Charles I, it was the general rule throughout England that a testator could dispose of all his personal property, except in those districts where the old law still existed.[43] The Statute of I Vict. c. 26, passed in 1837, gave the testator the unlimited power of disposing of his personal property.

43. **History of wills and testaments in the United States.**—In the United States each state has its own Statute of Wills, by which the questions of capacity, form, execution, and effect are determined. These statutes are based upon the English common law as modified by the Statute of Wills and subsequent statutes in England up to the time of the Declaration of Independence. In a few states settled by the French and Spanish, the law is colored by the French and Spanish law.[44]

44. **Extent of testamentary power—General rule.**—It was shown in previous chapters that none of the restrictions incident to feudal times and which prevailed under the English common law became operative in the United States. And the general rule as to testamentary power in this country is, that all property, both real and personal, corporeal and incorporeal, vested and contingent, legal or equitable, which the owner may be entitled to at the time of his

[43] 2 Blackstone, Commentaries, p. 493.

[44] "The net result may be said to be, that in the greater part of the United States, the law of wills is of pure English origin, modified by modern statutes, showing some influence of Spanish and French law in some of the Southern and Western States; while in Louisiana the law of wills is of French-Roman origin, gradually yielding in some respects to the influence of the remaining common law states."—Page, Wills (1st ed.), § 19.

death, may be disposed of by his lawfully executed will.[45]

This general rule covers only such property as the testator owns, and his right to dispose of property by will is always subject to the payment of all his just debts, liens, incumbrances, or other obligations created in his lifetime. And though his will dispose of all his property, creditors can assert their claims and have them paid out of the devised property.[46] In general, subject to the restrictions above named, a competent testator may dispose of his property as he pleases. He may select such of his children or relatives as he desires for his beneficiaries, or he may pass them all by and leave his property to strangers.[47]

45. **Same subject—Exceptions to the general rule.**—To the general rule that all of testator's property can be disposed of by will, certain exceptions, usually statutory, and substantially uniform throughout the United States, are to be noted:

1. The expenses of administration and statutory allowances for the support of the widow and the

[45] Page, Wills (1st ed.), §§ 143-148; Harvard College v. Balch, 171 Ill. 275; Tompkin's Est., 154 N. Y. 634; Allen's Succession, 49 La. Ann. 1096; Dodge v. Gallatin, 130 N. Y. 117; Cressinger v. Welch's Lessee, 15 Ohio 156. A representative statute provides that "Any person of full age, and of sound mind and memory, and not under any restraint, having any property, personal or real, or any interest therein, may give and bequeath the same to any person by last will and testament lawfully executed."—Rev. Stats. of Ohio, § 5914.

[46] Kimball v. Bible Soc., 65 N. H. 139; In Re Kidd, 3 Ch. Div. 558 (Eng.); Young v. Snow, 167 Mass. 287.

[47] It must be understood, however, that for a testator to disinherit his heirs at law, he must, either expressly or by necessary implication, devise all of his property to others, and unless this is done the heirs at law will be entitled to the estate.

minor children of the testator during the settlement of his estate, are usually made a charge upon the testator's property.[48]

2. The widow's dower is usually preserved to her, and takes priority over a devise of the realty, unless other provisions are made for her in the will which she elects to accept in lieu of her statutory right of dower, or unless it is waived by an ante-nuptial contract. Where the husband has similar interests in his wife's realty, he cannot be deprived of them by her will to which he does not consent.[49]

In a few states she may have both the property bequeathed in the will and her dower. But the general rule is different, and she may have both only in case it plainly appears by the will to have been the intention of the testator that she should have both.[50]

3. The homestead interest of the widow and the children of the testator, given in some states, cannot be barred by the testator's will.[51]

4. In some states, certain interests in the husband's personal property are reserved by statute to the widow, and where this is done he cannot by will divest her of such property.[52]

5. In a few states, the property acquired by husband and wife is regarded as community property, or

[48] Rev. Stats. of Ohio, §§ 6038-6040.

[49] Cook v. Adams, 169 Mass. 186; Warren v. Warren, 148 Ill. 641; Spangler v. Dukes, 39 Ohio St. 642; Wilber v. Wilber, 52 Wis. 298.

[50] Rev. Stats. of Ohio, § 5963; Collier v. Collier's Exrs., 3 Ohio St. 369.

[51] Peebles v. Bunting, 103 Ia. 489; Schorr v. Etling, 124 Mo. 42; Matheny's Est., 121 Cal. 267; Wells Estate v. Congregational Church, 63 Vt. 116.

[52] Cummings' Exr. v. Daniel, 9 Dana 361 (Ky.); Tyler v. Wheeler, 160 Mass. 206. So in Ohio, without express statute, Doyle v. Doyle, 50 Ohio St. 330.

"acquets," which belong equally to the husband and wife, so that neither can dispose of the interest of the other by will.[53]

6. Posthumous children, or children born after the death of the testator and not provided for in the will, usually take as if their parent had died intestate. In some states, if the testator had no children at the time of executing his will, and a child is subsequently born, such will is deemed revoked, unless such child was provided for in the will, or so mentioned as to show the intention of the testator not to provide for it.[54]

7. Living children not provided for in the will of the testator are usually allowed to take as heirs, unless it appears from the will that their omission was intended.[55]

8. In a number of states the statutes provide that a testator leaving a wife and children, cannot devise or bequeath his property to a charitable corporation or for charitable purposes, unless such will is executed a specified time before the death of the testator.[56] In Ohio this time is fixed at one year.[57] But it is held that no one can take advantage of such defective will except those who would otherwise take the property which has been devised to the charitable purpose.[58]

[53] Mayo v. Tudor's Heirs, 74 Tex. 471; Sharp v. Loupe, 120 Cal. 89; Cox v. Von Ahlefeldt, 50 La. Ann. 1266.

[54] Rev. Stats. of Ohio, § 5959.

[55] Rhodes v. Weldy, 46 Ohio St. 234.

[56] Fairchild v. Edson, 154 N. Y. 199; Wetter v. Habersham, 60 Ga. 193; Luebbe's Est., 179 Pa. St. 447; Milwaukee Protestant Home v. Beecher, 87 Wis. 409; Schmidt's Est., 15 Mont. 117.

[57] Rev. Stats. of Ohio, § 5915.

[58] Trustees Ohio St. Univ. v. Folsom, 56 Ohio St. 701.

9. In some states the statutes protect the wife and children of the testator from being barred by his will in favor of his mistress or illegitimate children. Thus in South Carolina, a testator leaving a wife and legitimate children cannot devise more than one-fourth of the clear value of his property to such persons, and no devise will be permitted to evade the provisions of such statutes.[59]

10. Another general statutory restraint upon the power of the testator to devise his property, is the statute or rule governing perpetuities. This rule of law is of long standing and is designated to prevent the postponement of the transfer of the legal title to real property beyond a reasonable time. The rule as generally fixed, both in England and the United States, provides that the vesting of the title of any estate cannot be postponed, upon a condition precedent, for a longer time than the life or lives of persons in existence at the creation of the estate, and twenty-one years thereafter.[60]

11. The interest which the testator may dispose of by will must be one which survives him and is not limited to his lifetime, as an estate for life.[61] So, while a testator has the power of disposing of an insurance policy upon his life which is made payable to his estate or his executors, he cannot by will change the beneficiary, when one has been named

[59] Breithaut v. Bauskett, 1 Rich. Eq. 465 (S. C.); Gore v. Clarke, 37 S. C. 537; Beaty v. Richardson, 46 L. R. A. 517.

[60] Madison v. Larmon, 170 Ill. 65; Terrell v. Reeves, 103 Ala. 264; Rev. Stats. of Ohio, § 4200; see subject, REAL PROPERTY, for more complete treatment.

[61] Young v. Snow, 167 Mass. 287; Studdard v. Wells, 120 Mo. 25.

and the rules of the company provide that the beneficiary must be named in a particular way, as by an order acknowledged before a justice of the peace.[62]

46. **Same subject—After-acquired real estate.**—Under the old English Statutes of Wills, a will did not pass real property acquired subsequently to the execution of the will even though the testator expressly provided that it should pass. After-acquired personalty did pass where the will covered it. The reason for the distinction was that personal property could be willed as at common law, whereas real estate could not. When later it became possible to will real estate, it was solely because a statute made it possible to do so. The statute being in derogation of the common law was construed strictly, and as the early English statutes contained no provision for passing after-acquired real property by will, it did not pass.

Modern statutes of wills almost without exception provide for the devise of after-acquired property. Thus the Illinois Statute of Wills empowers a testator to devise all his property which he "hath or at the time of his death or her death shall have."[63] However, the will must express the intention that after-acquired property actually pass by it.

47. **The testator's right to make a will is not a property right.**—While the right to make a will is general, and may be exercised by all, under certain

[62] Mellows v. Mellows, 61 N. H. 137; Wilburn v. Wilburn, 83 Ind. 55; Pingrey v. National Life Ins. Co., 144 Mass. 374; Masonic Benevolent Assoc. v. Bunch, 109 Mo. 560; Arthur v. Odd Fellows Assoc., 29 Ohio St. 557; Hartwig v. Schiefer, 147 Ind. 64; Fox v. Senter, 83 Me. 295; Hannigan v. Ingraham, 55 Hun 257 (N. Y.).

[63] Cummings v. Lohr, 246 Ill. 577, LEADING ILLUSTRATIVE CASES.

limitations, yet this right or privilege to dispose of one's property, to take effect at death, is not, and has never been, considered an absolute property right, so as to be protected by the various constitutional provisions designed to uphold and guard private property. As was seen in the previous chapters, the right to dispose of real estate by will did not exist at the early common law, and the disposition of real property by will has been a matter of gradual allowance, depending for the most part upon express statutory provisions, and at no time independent of legislative control.

The power to make a will is to be regarded, therefore, as a statutory right and not a natural or absolute right.[64] The legislature or sovereign authority in a state may not only prescribe regulations governing the making and construction of wills, but may also at any time qualify and limit the power to dispose of property by will. And this may be done after the real property sought to be disposed of by will has been acquired.[65] And the fact that the statutory changes in the law governing wills are made after the will has been executed by a living testator, and are intended to apply thereto, does not make such changes infringe any constitutional provisions.[66]

[64] Blackstone observes that the variety of laws and usages in regard to wills, and the further fact that there were countries where wills were not allowed, "serves to evince, that the right of making wills and disposing of property after death, is merely a creature of the civil state, which has permitted it in some countries and denied it in others; and even where it is permitted by law, it is subjected to different formalities and restrictions in almost every nation under heaven." 2 Blackstone, Commentaries, p. 491.

[65] Patton v. Patton, 39 Ohio St. 590.

[66] Blackbourn v. Tucker, 72 Miss. 735, where a change in the law after the execution of the will but during the life of the testator, operated to render void the gift to a charity.

In order that new laws governing wills may effect devises previously executed, the intention of the legislature must be plain, otherwise the law will be held to apply only to subsequently executed wills.[67]

48. **Agreement to will.**—Nevertheless this power to make a will is not so strictly personal to the testator that he may not by contract pledge himself to a particular disposition of his property by his will. Just as it is possible to make a contract to do any other lawful act, a contract may be made to will property to a certain person. Thus a contract to will land might be enforced after the testator's death by a proceeding in equity, just as specific performance might be had of a contract to deed property, but the contract must be fair and just in all its provisions and must, like all contracts, be supported by an adequate consideration. The contract must be sufficiently definite. Thus an agreement to will property to a person if he should make a success at farming it and if no unknown cause should turn up, is too vague, and equity will not enforce its performance.[68]

49. **Mutual, and joint and mutual wills.**—There is no legal objection to uniting the wills of two persons in a single instrument if such instrument can be given effect, on the death of either, as the will of one.[69] A joint will contained in a single instrument is the will of each of the makers, and at the death of one may be probated as his will and be again

[67] Swan v. Sayles, 165 Mass. 177; Packer v. Packer, 179 Pa. St. 580, where a statutory provision passed subsequently to the execution of the will, dispensing with the requisite of attesting witnesses, was held not to apply to the prior executed will.

[68] Dunshee v. Dunshee, 255 Ill. 296, 301.

[69] Frazier v. Patterson, 243 Ill. 80.

probated at the death of the other as the will of the latter. Wills may be joint or mutual or both joint and mutual. A joint will is one where the same instrument is made the will of two or more persons and is jointly signed by them. It is not necessarily either mutual or reciprocal. Mutual wills may be defined as the separate wills of two persons which are reciprocal in their provisions. A will that is both joint and mutual is one executed jointly by two or more persons, the provisions of which are reciprocal, and which shows on its face that the devises are made one in consideration of the other. These several classes of wills have some characteristics that distinguish them one from the other. A joint will which is not reciprocal is simply the individual personal will of each of the persons signing the same and is subject to the same rules that would apply if the wills were several. Mutual wills—that is, where two persons execute wills reciprocal in their provisions but separate instruments—may or may not be revocable at the pleasure of either party, according to the circumstances and understanding upon which they were executed. To deprive either party of the right to revoke such mutual will it is necessary to prove, by clear and satisfactory evidence, that such wills were executed in pursuance of a contract or a compact between the parties, and that each is the consideration of the other; and even in cases where mutual wills have been executed in pursuance of a compact or agreement between the parties, the law appears to be well settled that either party may, during the lifetime of both, withdraw from the compact

and revoke the will as to him. A joint and mutual will is revocable during the joint lives by either party, so far as relates to his own disposition, upon giving notice to the other, but it becomes irrevocable after the death of one of them if the survivor takes advantage of the provisions made by the other.[70]

These wills were not favored under the early English law and both the common law and the ecclesiastical courts pronounced against them, but the better opinion now, both in England and in America, is as above stated. An example of a joint and mutual will would be as follows:

"*Know all men by these presents,* that we, Thomas R. James and Jane G. James, wife of said Thomas, being of sound, disposing mind and memory, and desirous of disposing of our worldly estate after our deaths, respectfully do make, publish, and declare this and none other to be our and each of our last will and testament, hereby revoking all and singular any other will or wills by us or either of us at any time made.

"*First.* It is our will that all our debts, joint and several, together with funeral expenses, be fully paid directly after our deaths, respectively.

"*Second.* We give, devise, and bequeath to each other, respectively, all such estate, right, title, and interest as we, respectively, hold, possess, and enjoy in and to the following described real estate, viz.: The north-west quarter of the north-east quarter, the north-east quarter of the north-west quarter, the south-west quarter of the north-east quarter, and the south-west quarter of the north-west quarter of section eleven (11); and twenty-nine and one-half acres

[70] 30 Am. & Eng. Encyc. of Law (2nd ed.), p. 621.

on the west side of the east half of said section 11, all in township 6, south, range 4, west of the fourth principal meridian, in Pike county, Illinois, being the same premises on the part of which we now reside, and all of which we own, not as tenants in common, but each his and her part in severalty, hereby giving and devising the land of the one who may die first to the survivor during his or her natural life.

"*Third.* After the decease of both, it is the intention of this testament that the whole of said real estate, or any other we may own at the time of the decease of the survivor of us, shall go to and be held and enjoyed by our daughter, Eva Frazier, for and during her natural life, and after her death it is our will that the whole of our said real estate, and every part and parcel thereof, with the remainder in fee simple, shall pass to and in such estate vest in the lawful issue and children of the body of the said Eva Frazier living at the time of her decease, by her present or any other husband.

T. R. JAMES, (Seal)
JANE G. JAMES. (Seal)"

50. **Alternative wills.**—"Alternative wills" applies to the situation where the testator executes two wills covering the same property, on the same or different dates, with the provision that one or the other shall operate as his last will and testament, depending upon a certain contingency. It is common for the testator to incorporate this provision in one of the wills—if the wills are of different dates, in the later one of the two—or in a codicil executed subsequent to the execution of the two wills. The contingency may depend upon some natural event, or it may depend upon the will or wish of some per-

son. Thus, in one case, a testator made two wills of different dates. Then he made a codicil in which he provided that if he should die before a certain date, the former of the two wills should operate as his last will and testament, otherwise the latter. He died before the date and the former was declared his last will.[71] In another case, the testator made a codicil in which he made some provisions altering his will, and provided that his wife should have the option, after his death, of adding the codicil to his will or not as she chose. It was held that unless the wife elected to include the codicil, it would not become part of the will and would not become effective.[72]

51. **The rights of devisees under a valid will become vested property rights at the death of the testator.**—It is to be understood that the rights of devisees and legatees under a valid will become vested property rights at the time of the testator's death and cannot thereafter be subject to legislative control. Therefore any attempt by the legislature, through subsequent statutes, either to make a valid will invalid, or an invalid will valid, the testator having died before the passage of the statute, would be unconstitutional. That is, where a will is invalid under the law in force when the testator died, no subsequently passed statute can make it valid, and likewise, if the will is valid, no subsequent legislative act can destroy its validity.[73]

[71] In Re Hamilton's Estate, 74 Pa. St. 69.

[72] Goods of Smith, L. R. 1 P. & D. 717 (Eng.).

[73] People v. Powers, 147 N. Y. 104; Hartson v. Elden, 50 N. J. Eq. 522; Jones v. Robinson, 17 Ohio St. 171; Remington v. Metropolitan Sav. Bank, 76 Md. 546.

But the death of the testator will not prevent the legislature from changing the laws governing the settlement of estates, though such laws apply to the estate of the deceased testator. Thus where the subsequent law gave the surviving executor power to sell lands mentioned in the will, the law was held valid.[74]

[74] Bredenburg v. Bardin, 36 S. C. 197. See also McGillis v. McGillis, 154 N. Y. 532.

CHAPTER V.

CAPACITIES OF TESTATORS AND BENEFICIARIES IN GENERAL.

52. **Who may make a will—The present general rule.**—As a general rule, any person of the required age, of sound mind, and under no constraint, may make a will of both real and personal property, by complying with the prescribed statutory formalities.

At the early common law, the requirements regarding capacity to make a will and a testament were widely divergent, because of the essential difference in the two classes of property, and the fact that testaments were construed by ecclesiastical or canon law, while wills were governed by statute and common law. Under modern legislation the capacity required to make a devise of realty and a bequest of personalty are the same, except in a few states, where some slight distinctions are made. Attention is called also to the rule that nuncupative wills apply only to personal property and not to real estate.

In discussing capacity to make a will, it is to be understood that the testator must be of the required capacity at the time of making the will. If he is not qualified at the time the will is executed, the fact that he subsequently becomes capacitated will not make the will valid unless it is republished, which is practically a remaking of it at the time he becomes qualified; but if he is qualified when the

will is made, his subsequent incapacity will not destroy the validity of the will.[75]

This general rule as to who may make a will, will be discussed as regards: (1) disabilities of certain persons, and (2) disabilities as regards age.

53. **Disabilities affecting certain persons.**—Under this section will be discussed certain general disabilities which have prevailed affecting: (a) Criminals, (b) Aliens, and (c) Married women.

(a) *Criminals.* Under the ancient law, many persons who were regarded as offenders against municipal or religious laws, were classed as outlaws, and under the doctrine of attainder, they were prevented from inheriting or disposing of property and consequently could not make a valid will. The Constitution of the United States abolished attainder, or corruption of blood, so that the estate of a convicted felon is not forfeited, and unless the state statutes provide that a convict may not make a valid will, he may do so.[76]

(b) *Aliens.* At common law an alien might make a will of personal property, but as his real property was held subject to be defeated at any time by the rights of the state or sovereignty in which he lived, his power to will such property was limited by this defeasible title.[77] But in many states of the Union, all restrictions upon the property rights of aliens

[75] Reichenbach v. Ruddach, 127 Pa. St. 564; Martin v. Thayer, 37 W. Va. 38; Osgood v. Breed, 12 Mass. 525; Etter v. Armstrong, 46 Ind. 197; Burkett v. Whittemore, 36 S. C. 428.

[76] Kenyon v. Saunders, 18 R. I. 590.

[77] Taylor v. Benham, 5 How. 233 (U. S.); Gray v. Kauffman, 82 Tex. 65; Phillips v. Moore, 100 U. S. 208.

have been abolished; where they have not been abolished, the common law rule still prevails.[78]

(c) *Married women.* Unmarried women are subject to the same rule as other persons, but married women, at common law, and to some extent under modern statutes, are subject to restrictions upon their testamentary powers.[79] As a general rule, however, the restrictions affect both husband and wife alike, attention being called to the rules referred to on pages 38 and 39 above.

Thus at common law a married woman was, with the exception hereafter noted, entirely incompetent to make a will of real estate, even with her husband's consent, or though her husband was the devisee.

As an exception to the above rule, a married woman could, at common law, dispose by will of real estate to which she had an equitable title, as by virtue of the conveyance of it to trustees for her sole and separate use.[80] And she could also dispose

[78] In Iowa aliens may hold 320 acres of land for a period of ten years. Furenes v. Severtson, 102 Ia. 322. The right of the states to hinder or forbid non-resident aliens from acquiring or holding real estate is limited by the treaties made by the United States with other nations, by which the citizens of each country are allowed to hold real property within the territory of the other. Burrow v. Burrow, 98 Ia. 400; Adams v. Akerlund, 168 Ill. 632; Rixner's Succession, 48 La. Ann. 552, 32 L. R. A. 177.

[79] Bacon, Abr. Wills (B), p. 481; Osgood v. Breed, 12 Mass. 525; Bradish v. Gibbs, 3 Johns. Ch. 523 (N. Y.); Fitch v. Brainerd, 2 Day 163 (Conn.). By the original Statute of Wills, 22 Hen. VIII, married women were apparently allowed to make wills, but this apparent power was promptly changed by the Stat., 34 Hen. VIII, chap. 5, which expressly excepted married women from those who might make a will.

[80] Rich v. Cockell, 9 Ves. Jr. 369 (Eng.); Peacock v. Monk, 2 Ves. 190 (Eng.). Where by contract made before or after marriage, upon a new consideration, a woman reserved power to dispose of her separate property by will, equity would enforce the contract, without the appointment of trustees. Hall v. Waterhouse, 5 Giff. 64 (Eng.); Johnson v. Johnson, 24 S. W. 628 (Ky.).

of real estate, conveyed to her use, by appointing beneficiaries, where a power authorizing such appointment was contained in the conveyance.[81]

As to personal property at the common law, a married woman could only make a will disposing of her personal property, in case her husband gave his consent to the particular will in question, with a full knowledge of its contents, and did not revoke his consent before the will was probated.[82] The consent of the husband might be by parol before or after the wife's death, and might be express or implied. It must be to the very will in question with full knowledge of its contents, and could always be revoked by the husband before probate, but not afterwards.[83]

As an exception to the above rule, a married woman might at common law make a testament without her husband's consent, disposing of personal property settled upon her to her sole and separate use, and this whether such property was derived from her husband or from a third person.[84]

54. **Same subject—Modern rule as to right of married woman to dispose of property by will.**—In

[81] Hawkins v. Kemp, 3 East 410 (Eng.); Pride v. Bubb, 41 L. J. Ch. 105; Wagner v. Ellis, 7 Pa. St. 411; Dunn's Appeal, 85 Pa. St. 94.

[82] Marston v. Norton, 5 N. H. 205; Anderson v. Miller, 6 J. J. Marsh. 568 (Ky.). The reason for this rule being that, at common law, a wife really had no personal property unless by the consent of her husband. See in this connection 3 Cyclopedia of Law, §§ 319-322.

[83] Kurtz v. Saylor, 20 Pa. St. 205; Brook v. Turner, 2 Mod. 170 (Eng.); Cutter v. Butler, 25 N. H. 343. A married woman could also dispose of her personal property by will where her husband was incapacitated to act for himself, or had abjured the realm, was a convicted felon, or civilly dead. See Page, Wills (1st ed.), § 89.

[84] Tucker v. Inman, 4 M. & G. 1049 (Eng.); Lee v. Bennett, 31 Miss. 119.

the United States, nearly all of the common law disabilities affecting married women in relation to their property have been removed by statutes. Thus in Arkansas, Connecticut, Delaware, Georgia, Indiana, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Texas, Utah, Vermont, West Virginia and Wisconsin, married women have substantially the same rights to dispose of property by will as unmarried women and men. In Missouri, New Hampshire, New Jersey, Oregon, Rhode Island, Tennessee and Virginia, a married woman is unrestricted except as to her husband's right of courtesy. In California, Kansas and Massachusetts, married women may dispose of but half of their estate without the consent of their husbands. In Alabama, Arizona, California, Georgia, Kentucky, Louisiana and Washington, they may dispose of their statutory separate property by will.[85]

State statutes are continually modifying and liberalizing the restrictions imposed upon married women and it is possible that new statutes have been passed in some of the states above mentioned doing away

[85] Where state statutes require the husband's consent to the wife's will, or testament, this consent must usually be in writing. Gregory v. Oates, 92 Ky. 532; Tyler v. Wheeler, 160 Mass. 206. The right of a married woman to dispose of her property by will, thus depends upon statutes either giving her express power or removing the disabilities imposed by the common law; these statutes are so construed that only the form of will prescribed therein can be made by the married woman. Thus where the statute provided that she might make a will of her separate estate, when attested by witnesses, it was held that a holographic will without witnesses was invalid, though such a will would have been valid if made by a man or unmarried woman. Scott v. Harkness, 59 Pac. Rep. 556 (Id.).

with more of the common law restrictions on the wife's right to dispose of her property.[86]

55. **Disabilities as regards age.**—Nonage, or lack of capacity to make a will because of immature age, has been one of the disabilities common to all legal systems. Under the early English ecclesiastical law a will of personal property could be made by males at the age of fourteen, and by females at the age of twelve years and over. The Statute of Wills (32 Henry VIII) fixed the age for capacity to will real property at twenty-one years.[87] The Statute of I Vict. fixed the age of capacity at twenty-one years for both real and personal property.

In the majority of the United States a person must have reached the age of twenty-one years to have capacity to make a will as respects real or personal property.[88] In some of the states the age of capacity required is twenty-one years for real estate and eighteen years for personal property.[89] In a few states, the statutory age for making a will is eighteen years for both real and personal property.[90] In Colorado, Illinois, Maryland, Missouri,

[86] See subject of Wills, American & English Encyclopedia of Law (2nd ed.).

[87] 2 Blackstone, Commentaries, p. 497.

[88] This is a rule in Arizona, Florida, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, South Carolina, Texas, West Virginia and Wyoming.

[89] This is the rule in Alabama, Arkansas, Oregon, Rhode Island and Virginia.

[90] This is the rule in California, Connecticut, Idaho, Montana, Nevada, North Dakota, South Dakota and Utah. In Wisconsin 21 years is required in all cases, except that a married woman is competent to make a will at the age of 18 years. In Colorado persons at the age of 17 years can make a valid will of personal property.

and Washington, the age of capacity is fixed at twenty-one years for males and eighteen years for females. In New York, a person must be twenty-one years of age to dispose of realty by will; and if a male person, eighteen years of age, and if a female, sixteen years of age, to make a valid will disposing of personalty.

56. **Same subject—Effect of statutory requirements as to age.**—The state statutes fixing the age of capacity to make a will always control whenever this question arises. The statutes, therefore, should always be consulted in determining the age of capacity.

A person is deemed to have attained the age required on the last day of the year immediately preceding the prescribed year, that is, if the age of capacity is twenty-one, a person is of full age on the last day of his twentieth year.[91]

57. **Who may take by will—The general rule.**—As a general rule, any person may take property by will, including married women, infants and insane persons, so long as the gift in itself is not injurious.

58. **Exceptions to the general rule.**—Some exceptions to this general rule which were made at common law, and which prevail to some extent under modern statutes, are now to be mentioned. These exceptions include:

Aliens. At common law aliens could take a perfect title to personal property under a testament, and such property was only liable to be confiscated by the state in case of the party becoming an alien

[91] Bacon, Abr. Wills (B), p. 481; Ex parte Holyland, 11 Ves. 11 (Eng.).

enemy.[92] And at common law an alien could take a valid title to real property under a will, but his title was subject to be defeated at any time by the government, or state in which he lived, taking possession of the same. In many of the states, statutes have done away with the common law disabilities imposed upon aliens, and where this has been done they are as free to take and hold property as citizens are. In a few states, as Iowa, Illinois, New York, aliens are either forbidden to acquire real estate or are limited in the amount they may hold.[93]

59. **Same subject—Corporations.**—Under the early English law a corporation might take real or personal property by will, but later under the Statute of Mortmain, and until the Statute of Wills of I Vict., corporations could not take real property by devise. This Statute of Mortmain has never prevailed in this country except in Pennsylvania and South Carolina for a while, so that, unless restrained by express provisions of the statutes, a corporation may take by will such real or personal property as it is authorized to hold in its charter.[94]

[92] Harney v. Donohoe, 97 Mo. 141; Craig v. Leslie, 3 Wheat. 563 (U. S.); Page, Wills (1st ed.), § 150.

[93] Opel v. Shoup, 100 Ia. 407; Furenes v. Severtson, 102 Ia. 322; Jele v. Lemberger, 163 Ill. 338; Schultze v. Schultze, 144 Ill. 290, 19 L. R. A. 90; McGillis v. McGillis, 154 N. Y. 532.

[94] McGraw's Est., 111 N. Y. 66; American Bible Soc. v. Marshall, 15 Ohio St. 537. In South Carolina a statute similar to the Statute of Mortmain was in effect until 1872. Am. Bible Soc. v. Noble, 11 Rich. Eq. 156 (S. C.). In Maryland, by a constitutional provision, a religious corporation cannot take by devise unless the legislature sanctions it. Church v. Smith, 56 Md. 363. In a few states, the statutes provide that a corporation cannot hold real estate in excess of a named sum, and under this rule a devise to such a corporation in excess of the specified amount will be invalid as to the excess. Starkweather v. Amer. Bible Society, 72 Ill. 50; Wood v. Hammond, 16 R. I. 98.

In the case of devises to foreign corporations, the power to take is usually governed by the law of the state where the land lies, but it is held that if, in its home state, the corporation cannot take by devise, it cannot take in another state, though the laws of that state permit corporations organized there, to take.[95]

An unincorporated company may, in its name, take personal property by will, but not real estate. But if the company becomes incorporated before the title is to vest, it may then take devises. So gifts to charities, or to corporations, to be thereafter organized, are good.[96]

Public corporations, such as municipalities, the state, and the like, may be beneficiaries under a will.[97] It is a question decided both ways whether or not the United States may take property by devise.[98]

60. **Same subject—Other cases.**—It is held, on grounds of public policy, that one who murders the testator for the purpose of securing the benefit of his will, cannot be permitted to take under it. And a devise to any unlawful society will not be allowed to take effect.[99]

61. **Same subject—Illegitimate children.**—At common law the rule prevailed that while a parent or reputed parent to an illegitimate child could pro-

[95] Starkweather v. Amer. Bible Soc., 72 Ill. 50; contra, Amer. Bible Soc. v. Marshall, 15 Ohio St. 537; Thompson v. Swoope, 24 Pa. St. 474.

[96] Royer's Est., 123 Cal. 614.

[97] Beurhaus v. City of Watertown, 94 Wis. 617; Quincy v. Attorney-General, 160 Mass. 431; Carder v. Fayette County, 16 Ohio St. 353.

[98] Dickinson v. U. S., 125 Mass. 311, holding that it can take; and In re Fox's Estate, 52 N. Y. 530, and U. S. v. Fox, 94 U. S. 315, holding that it cannot.

[99] Riggs v. Palmer, 115 N. Y. 506, 12 Amer. St. Rep. 819.

vide for it by will, others than the parents could not provide by will for future-born illegitimate children, and devises by such persons were held void, the reason being that such provisions might encourage illegitimacy.[1]

By the modern rule the more humane policy of the civil law is followed rather than the austere one of the common law, in that all illegitimate children, whether born or to be born, may be provided for by will both by their reputed parents and others, and such bequests will be valid if the beneficiaries are properly described. A sufficient description is made when they are mentioned as the illegitimate children of a named mother.[2]

[1] In Re Bolton, 31 Ch. Div. 542 (Eng.); Occleston v. Fullalove, L. R. 9 Ch. 147 (Eng.).

[2] Page, Wills (1st ed.), § 156; School's Will, 100 Wis. 650; Hayden v. Barrett, 172 Mass. 472; Hughes v. Knowlton, 37 Conn. 429.

DIVISION II

THE EXECUTION, REVOCATION, REVIVAL AND REPUBLICATION OF WILLS

CHAPTER VI.

GENERAL PRINCIPLES.

62. **In general.**—The purpose here will be to indicate how to perfect a will. Incidentally, those questions affecting the life of a will will also be considered, such as revocation, republication and revival. The questions of the revocation, republication and revival of parts of wills and, in that connection, lapsed, void and adeemed legacies, will be discussed. In fact, under this general heading all matters that properly go to the structure, form, execution and continued existence of the will or any of its parts or provisions, are to be treated.

63. **A will is ambulatory.**—A will is unlike a deed in that a will may at any time be revoked by the testator. It is commonly said that a will is ambulatory until death. By that is meant that the will is inoperative and ineffective until death and takes effect at death only if it is then in existence.[8] A deed, on the contrary, takes effect at once upon delivery and acceptance, and may not thereafter be revoked by the grantor. In short, where a person

[8] Stetson v. Stetson, 200 Ill. 601, LEADING ILLUSTRATIVE CASES.

makes a gift by deed he puts it out of his control to recall the gift, but where he makes it by will, he may recall it at any time before his death.

64. **Wills purely statutory.**—As was explained hereinbefore, the modern will was unknown at common law. It is true, there were wills of personal property recognized by the ecclesiastical courts, but a will of real estate was not recognized except in some localities, being inconsistent with and derogatory of the feudal ideas of land tenure. The subject of wills, therefore, must necessarily base its foundation upon some statute. In this country, the subject is governed by a statute in each individual state. These statutes are generally of the same nature, however, and attention shall therefore be called to three statutes which are appended here, under the designations by which they are hereinafter referred to.

There were some very old English statutes on the subject, but the first one that is of any value for the purpose of these illustrations is the one passed in England in A. D. 1677 in the twenty-ninth year of the reign of Charles II. This was known as part of the Statute of Frauds.

29 Car. II. c. 3 (1677).—V. And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June, all devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills, or by this Statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested

and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.

VI. And moreover, no devise in writing of lands, tenements or hereditaments, nor any clause thereof, shall at any time after the said four and twentieth day of June be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent; (2) but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burned, cancelled, torn or obliterated by the testator, or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.

XII. And for the amendment of the law in the particulars following; (2) be it further enacted by the authority aforesaid, that from henceforth any estate *pur autre vie* shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; (3) and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy as assets by descent, as in case of lands in fee-simple; (4) and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

XIX. And for prevention of fraudulent prac-

tices in setting up nuncupative wills, which have been the occasion of such perjury; (2) be it enacted by the authority aforesaid, that from and after the aforesaid four and twentieth day of June no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof; (3) nor unless it be proved that the testator at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will, or to that effect; (4) nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

XX. And be it further enacted, that after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.

XXI. And be it further enacted, that no letters testamentary or probate of any nuncupative will shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired; (2) nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same, if they please.

XXII. And be it further enacted, that no will in

writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.

XXIII. Provided always, that notwithstanding this Act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his movables, wages and personal estate, as he or they might have done before the making of this Act.

XXIV. And it is hereby declared, that nothing in the Act shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estates, but that the prerogative court of the Archbishop of Canterbury, and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before, in every respect; subject nevertheless to the rules and directions of this Act.

The second statute is one passed in England in the year A. D. 1837 during the reign of Queen Victoria. The material part is as follows:

7 Wm. IV. & 1 Vict. c. 26 (1837).—Be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say), the word "will"

shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service, and Purveyance, and for settling a revenue upon His Majesty in lieu thereof, or by virtue of an Act passed in the Parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service, and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

II. And be it further enacted, that an Act passed

in the thirty-second year of the reign of King Henry the Eighth, intituled The Act of Wills, Wards, and Primer Seisins, whereby a man may devise two parts of his land; and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled The Bill concerning the Explanation of Wills; and also an Act passed in the Parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled An Act how Lands, Tenements, etc., may be disposed by Will or otherwise, and concerning Wards and Primer Seisins; and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled An Act for Prevention of Frauds and Perjuries, and of an Act passed in the Parliament of Ireland in the seventh year of the reign of King William the Third, intituled An Act for Prevention of Frauds and Perjuries, as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie,* or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an Act passed in the fourth and fifth years of the reign of Queen Anne, intituled An Act for the Amendment of the Law and the better Advancement of Justice, and of an Act passed in the Parliament of Ireland in the sixth year of the reign of Queen Anne, intituled An Act for the Amendment of the Law, and better Advancement of Justice, as relates to witnesses to nuncupative wills; and also so much of an Act passed in the fourteenth year of the reign of King George the Second, intituled An Act to amend the Law concerning Com-

mon Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled An Act for Prevention of Frauds and Perjuries, as relates to estates *pur autre vie;* and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled An Act for avoiding and putting an End to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that Part of Great Britain called England, and in His Majesty's Colonies and Plantations in America, except so far as relates to His Majesty's colonies and plantations in America; and also an Act passed in the Parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled An Act for the avoiding and putting an End to certain Doubts and Questions relating to the Attestations of Wills and Codicils concerning Real Estates; and also An Act passed in the fifty-fifth year of the reign of King George the Third, intituled An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will; shall be and the same are hereby repealed, except so far as the same Acts or any of them respectively relate to any wills or estates *pur autre vie,* to which this Act does not extend.

III. And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of would devolve upon the heir at law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the

nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates *pur autre vie,* whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

VI. And be it further enacted, that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie,* whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant, and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

VII. And be it further enacted, that no will made by any person under the age of twenty-one years shall be valid.

VIII. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act.

IX. And be it further enacted, that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

X. And be it further enacted, that no appoint-

ment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

XI. Provided always, and be it further enacted, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he may have done before the making of this Act. * * *

XIII. And be it further enacted, that every will executed in manner hereinbefore required shall be valid without any other publication thereof.

XIV. And be it further enacted, that if any person who shall attest the execution of a will shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

XV. And be it further enacted, that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be ad-

mitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

XVI. And be it further enacted, that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

XVII. And be it further enacted, that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

XVIII. And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions).

XIX. And be it further enacted, that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

XX. And be it further enacted, that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same

by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

XXI. And be it further enacted, that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

XXII. And be it further enacted, that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

XXIII. And be it further enacted, that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as

the testator shall have power to dispose of by will at the time of his death.

XXIV. And be it further enacted, that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

XXXIV. And be it further enacted, that this Act shall not extend to any will made before the first day of January one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

The third statute is one in this country, the Illinois Statute of Wills, of which the following is here set forth:

Illinois Revised Statutes, 1911. Chapter 148, Page 2376.

§ 2. All wills, testaments and codicils, by which any lands, tenements, hereditaments, annuities, rents or goods and chattels are devised, shall be reduced to writing, and signed by the testator or testatrix, or by some person in his or her presence, and by his or her direction, and attested in the presence of the testator or testatrix, by two or more credible witnesses, two of whom, declaring on oath or affirmation, before the county court of the proper county, that they were present and saw the testator

or testatrix sign said will, testament or codicil, in their presence, or acknowledged the same to be his or her act and deed, and that they believed the testator or testatrix to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of said will, testament or codicil, to admit the same to record: Provided, that no proof of fraud, compulsion or other improper conduct be exhibited, which, in the opinion of said county court, shall be deemed sufficient to invalidate or destroy the same, and every will, testament or codicil, when thus proven to the satisfaction of the court, shall, together with the probate thereof, be recorded by the clerk of said court, in a book to be provided by him for that purpose, and shall be good and available in law for the granting, conveying and assuring the lands, tenements and hereditaments, annuities, rents, goods and chattels therein and thereby devised, granted and bequeathed.

§ 8. If any beneficial devise, legacy or interest shall be made or given in any will, testament, or codicil to any person subscribing such will, testament or codicil, as a witness to the execution thereof, or to the wife or husband of such person, such devise, legacy or interest shall, as to such beneficiary thereof, and all persons claiming under him, be null and void, unless such will, testament or codicil be otherwise duly attested by a sufficient number of witnesses, exclusive of such person, according to this act; and he or she shall be compellable to appear and give testimony on the residue of such will, testament or codicil, in like manner as if no such devise or bequest had been made. But if such witness or beneficiary would have been entitled to any share of the testator's estate in case the will, testament or codicil was not established, then so much of such share shall be saved to such witness or beneficiary as shall not

exceed the value of the said devise or bequest made to him or her as aforesaid.

This act being remedial in character shall be construed liberally, and shall apply to cases arising on wills of persons deceased, prior to the adoption of this act, but not finally adjudicated.

§ 17. No will, testament or codicil shall be revoked, otherwise than by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence, by his direction and consent; or by some other will, testament or codicil in writing, declaring the same, signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid, in due form of law.

It is desired that the student familiarize himself with these three statutes and note particularly the distinction between them, for reference will be made to them repeatedly. The first statute will be referred to as the "Statute of Frauds," the second as the "Wills Act," and the third as the "Illinois Statute of Wills." The statutes in use in the states may all, with slight variations, be said to have been modeled upon plans of which one or other of these statutes is an example.

CHAPTER VII.

THE EXECUTION OF WILLS.

Section A. Fraud, Undue Influence, and Mistake.

65. **Fraud and undue influence.**—The general proposition contemplates that a will, the execution of which is obtained by fraud, is voidable; that is, it may be set aside as against the one who has procured its execution by fraud, where someone interested in the estate of the testator, such as an heir or an executor or administrator, sues. The usual situation, however, is that a will obtained by fraud of some beneficiary, makes provisions for others, which other provisions were not obtained by fraud. What then shall be done? Shall the whole will be set aside? The rule is that only the provision in favor of the one who has procured the provision by the fraud shall be set aside.[4]

66. **What is fraud?**—Examples of fraud are legion. The most common form of fraud is where one paper has been obtruded on the testator for another which he intended to sign,[5] as where the papers were so presented to him that he signed a paper beneath the one he thought he was signing.

Another form of fraud, a little more complicated than the above, is where the beneficiary under the

[4] Appeal of Harrison, 48 Conn. 202.
[5] Doe v. Allen, 8 T. R. 147 (Eng.).

will obtains a bequest or legacy by making a misrepresentation as to some material fact. Of course, the common form of active misrepresentation is governed by the general rule above suggested in cases of fraud. There is, however, a line of cases of which mention ought here to be made.

67. **False identity or character.**—Take the case of a man who, having one wife still living, married a second time. The second wife died in ignorance of this and at her death gave a legacy to her supposed husband. The question at once arises, Is such a legacy good? This is to be determined from the intention of the testatrix as manifested in her will. Thus, if she had merely said, "I give $100 to John Brown," such a legacy could possibly not be defeated by the mere showing that John Brown had imposed upon the testatrix by marrying her at a time when he had a former wife undivorced and still living. But if, on the other hand, the will reads, "I give $100 to my husband, John Brown," or "to John Brown, my husband," and it appears that John Brown had married the testatrix while his former wife was living and undivorced, the legacy would be invalid. The reason is, that in the latter case the law will presume as against the party guilty of the fraud, that the testatrix gave the bequest because she thought she was giving to her husband and would not have given it to him had she known he was not legally her husband, whereas in the former nothing appears but that she might have given it to him, John, with knowledge of his deception.[6]

[6] Kennell v. Abbott, 4 Ves. 802 (Eng.); Wilkinson v. Joughin, L. R. 2 Eq. 319 (Eng.).

68. **Where deceiver is innocent.**—Suppose that a woman with a child marries a man, leading him to believe she is a widow, but as a matter of fact is not a widow and has an undivorced husband living. The man dies in ignorance of this and in his will gives a bequest to his "step-daughter, Sarah." It appears that the same rule does not apply here as in the other case, for here the legatee herself is innocent of any wrong. In such case it will be presumed, unless it is proved to the contrary, that the testator intended to give to that particular child and not to someone that happened to be "stepchild."[7] In other words, the gift may be to one of two personalities: it may be (a) to that particular person known to the testator by the name, or it may be (b) to some person falling within the designation of the relationship mentioned in the will. Where the beneficiary was an intentional deceiver, the presumption is that the gift was intended for (b); where the beneficiary was an unintentional deceiver, the presumption is that it was intended for (a).

The whole question resolves itself into the best construction of the possible intention of the testator. Did he make the bequest because he wanted to provide for his stepchild, or did he make it because he had taken a fancy to this particular child, namely, to the personality, and therefore wanted to remember her in his will? In one case, the testator's housekeeper misrepresented to him that a mulatto child she had borne, was his child. The testator remem-

[7] Wilkinson v. Joughin, L. R. 2 Eq. 319 (Eng.); Howell v. Troutman, 53 N. C. 304.

bered the child in his will, and after the testator's death a proceeding was instituted to set aside this bequest.[8] In that case the court said: "Supposing that he did believe the child was his, and that the mother of it told him so; there is not the slightest testimony to show that she ever asked him to make a will in favor of her and the child, or that she knew, before the will was made, that he intended to make one, or, afterwards, that he had made it. * * * At most, it is said that she made him believe that he had begotten a child by her, which everybody but himself could see was a mulatto. Surely that alone cannot destroy a will which the mother is not shown to have had the slightest agency in procuring. * * * The truth is that the old man, being childless by his wife, took a strange fancy to the child of his housekeeper, and, whether it was his own or not, he had a father's love for it, and our law imposes no prohibition upon a man to prevent him from bestowing his property upon the object of his affection."

69. **Undue influence.**—By far the more numerous cases, however, fall within the designation of undue influence. The precise definition of this term is difficult. The mere fact that the beneficiary persuaded the testator to make a provision for him, is not undue influence,[9] nor is it evidence thereof that there appears great inequality in the distribution of the property in favor of certain beneficiaries.[10] To

[8] Howell v. Troutman, 53 N. C. 304.
[9] Hall v. Hall, L. R. 1 P. & D. 481 (Eng.).
[10] Storer v. Zimmerman, 28 Minn. 9.

amount to undue influence, there must be some act done or power exerted by some person upon the testator, in such a way as to destroy his free agency.[11] The law considers that in order for a will truthfully to express the wishes of the testator, it must be the product of his free will. By that it is not meant that he might not be argued or even persuaded into altering some intention that he had originally formed, so long as after the argument or persuasion his mind is left free to act, and, if then he acts in accordance with the argument or persuasion, so long as he expresses his real wishes at the time of the making of the will.

70. **Matter of proof.**—Of course, it is at once apparent that the question whether in a given case the testator did act of his own will or not is one of fact to be determined by the jury or the court, as the case may be, and the presumption always is that the testator was a free agent in the making of the will. This presumption the contestant, being the one contesting the will, must overcome by a preponderance of the evidence.[12]

Just what evidence might amount to undue influence varies with a multitude of cases. In one case a second wife procured the husband to make a will cutting off the children by the former wife.[13] The evidence disclosed that the husband was illiterate and a much weaker character than the wife, and that she everlastingly nagged and worried him to leave all of his property to her children, disparaged

[11] Rollwagen v. Rollwagen, 63 N. Y. 504, 519.
[12] Downey v. Murphy, 1 Dev. & B. 82 (N. C.).
[13] In Re Tyner's Estate, 97 Minn. 181, LEADING ILLUSTRATIVE CASES.

to him the children by the former wife, and in effect made it so miserable for him that he yielded for the sake of peace in the household and for his own peace of mind, and at a time when he needed quiet and rest. It was held that here was a case for the jury; that the contestant had so far made out a case of undue influence as to entitle him to have the jury decide whether or not there was undue influence.

Again the relation in which the parties stand to each other is often a material circumstance and may of itself, in some cases, be sufficient to raise a presumption of undue influence.[14] Where a gift by deed or otherwise than by will, is made to one who stands in a fiduciary relation to the donor, that gift is presumed to have been obtained by undue influence. That is not true as to wills. However, the fact of a fiduciary relationship coupled with other circumstances makes a case of undue influence quicker than without the fiduciary relation.[15] Thus, in one case it was said: "The facts that Joseph Yess, who occupied a fiduciary relation to his mother, was the active agent in having the will prepared; that he procured its preparation by his agent, who was a stranger to his mother; that he and his agent, alone, were present with her when it was drawn; that she was the dependent party and he the dominant party, and that he profited substantially by the will, are circumstances tending to show the exercise of undue influence." Again, the active agency of the beneficiary of a will in procuring it to be drawn, especially in

[14] In Re Smith's Will, 95 N. Y. 516.
[15] Yess v. Yess, 255 Ill. 414, 419.

the absence of those who have at least equal claims upon the justice of the testator, and where the testator is enfeebled by old age and disease, is a circumstance indicative of undue influence.[16] However, improper relations between the testator and the beneficiary, alone, do not amount to it,[17] though it will be more readily inferred where the beneficiary was the mistress than where she was the wife.[18]

For particular rules as to what evidence is admissible to prove undue influence, and what is not, reference should be had to the article on Evidence. It might not be inappropriate to make mention of one case here to illustrate the difficulty of the proof. The contestant was not permitted to prove the undue influence by evidence of statements of the testatrix made out of the presence of the defendant, while the defendant was permitted to exhibit in evidence letters that the contestant wrote to the testatrix during her life in which he begs for money and in which he confesses to having embezzled money. These letters were admitted to show that the testatrix may have been induced to cut off the contestant from enjoyment under her will because he was a spendthrift rather than that the defendant induced her to cut him off by falsely representing the contestant's character.[19]

71. **Mistake.**—Inasmuch as the law requires the will to be the testator's freely intended act, a will drawn by mistake is no more the act of the testator

[16] Donnan v. Donnan, 256 Ill. 244, 251.
[17] Main v. Ryder, 84 Pa. 217.
[18] Lord v. Read, 254 Ill. 350, 356.
[19] Doyle v. Doyle, 257 Ill. 229.

than a will obtained by undue influence. The question, however, always arises after the death of the testator, and the difficulty then is to determine if there was really a mistake. There is also always a further difficulty. Suppose that a will is incorrectly read over to the testator by the attorney at the time his signature is affixed to it. May the will be corrected after the testator's death to conform to the way in which he had intended it to be drawn? This latter situation may arise also under the subject of fraud, as will appear later.

It is conceivable that a mistake may occur in one of two ways: (1) Where the will was drawn by the attorney in a manner different from that in which the testator intended it to be drawn, and (2) where the testator intended the will to be as it was drawn, but was mistaken as to the legal effect of the will as thus drawn. In the first class, three situations are possible, to wit, (a) the testator may have had the will read over to him as it was and, not noting the mistake in it, signed it believing it was as he had directed it to be drawn, or (b) he may have signed the will without reading it or having it read over to him, taking the attorney's word for it that it was as ordered, or (c) the attorney may have incorrectly drawn the will and then misread it to the testator so as to make it appear that it was actually drawn as ordered.

72. **Mistake as to contents of will.**—Where in class (1) the situation is that of (a), it is clear that no alteration can be made after the testator's death.[20]

[20] Guardhouse v. Blackburn, L. R. 1 P. D. 109 (Eng.); Harter v. Harter, L. R. 3 P. & D. 11 (Eng.).

To permit such would open the door to great possibilities of fraud. Where the situation is that of (b) some question exists among the authorities, whether it is admissible after the testator's death to show evidence of the mistake. It is argued on the one hand that to permit it would open up the same wide door to fraud, and on the other hand, to deny it would operate unjustly. Possibly the better rule is that evidence of the mistake is admissible for the purpose of striking out a part of the will, but that nothing can be substituted in place of the part thus stricken out.[21] But where to strike out a word would increase the bequest to any of the beneficiaries in the will, it is equally as objectionable as adding words to a will, as where it was claimed that the attorney made a mistake and added the word "real" to "all my estate," it would be improper to add "personal" thereto; likewise would it be objectionable to strike out "real," for either change would increase the bequest of the will.[22] Where the situation is that of (c), the will cannot be said to be the will of the testator at all. The procedure in such case is not to change the will to conform to the intention of the testator, for that would be making a will without the formalities required by the statute; but the result of such a state of facts as in situation (c) is to render those parts of the will which are different from the way in which the will was read over to the testator, absolutely void, and if, then, the will cannot be divided so that those parts correctly read to the

[21] Goods of Boehm, L. R. (1891), P. 247 (Eng.).
[22] Harter v. Harter, L. R. 3 P. & D. 11 (Eng.).

testator can stand without the other, the whole will is void.[23]

In resumé then, we have three situations under class (1). The first and second raise circumstances where, for all that appears, the testator may have changed his mind between the time of ordering the will drawn, and the time when he affixed his signature, so that no one can say from the mere fact that the will was by mistake of the attorney drawn contrary to the testator's instructions, that the testator did not ultimately intend it to be so drawn. In the third situation, however, there is a fraud practiced upon the testator so that the instrument he actually puts his name to, is not the instrument he intends to sign.

73. **Mistake as to matters other than the contents of the will.**—In the second class, the testator proceeds upon a mistake as to some fact outside the will, as where his attorney told him that certain words in the will had a certain effect in law, and the attorney's advice was bad,[24] or where the testator, intending to cancel a debt due from the one he had named executor in the will, was incorrectly advised by counsel that making the debtor executor, would operate to extinguish the debt.[25] In all the cases of this class, it seems the will must stand as drawn, mistake or no mistake.

74. **Ambiguities.**—In connection with mistakes in the making of wills, the subject of ambiguities requires consideration. This subject belongs more

[23] Guardhouse v. Blackburn, L. R. 1 P. D. 109 (Eng.).
[24] Collins v. Elstone, L. R. (1893), P. 1 (Eng.).
[25] Brown v. Selwin, Cas. temp. Talb. 240 (Eng.).

properly to the article on Evidence, but will receive a brief discussion here.

75. **Ambiguitas patens.**—It is commonly said that there are two kinds of ambiguities: (1) *ambiguitas patens,* which is an ambiguity apparent on the face of the will, and (2) *ambiguitas latens,* which is one not apparent on the face of the will. Of the former the rule is that no evidence may be introduced to clear up the ambiguity, for that would amount to making a will otherwise than in the mode indicated by statute.[26] Thus in one case the instrument recited "that it is my will that my daughter, Mary, and my son, Charles, and my daughter, Annie, shall be equally divided between all three."[27] Manifestly here was an ambiguity on the very face of the will. The testator had omitted the property he wished to divide between the three. No evidence of what the testator had omitted, or what his intentions were, could be entertained.

76. **Ambiguitas latens.**—The other kind of ambiguity exists where the will on its face makes sense; that is, so far as the language and text of the will are concerned, it is intelligible, but when it comes to carrying out its provisions, it is found that the provisions of the will convey property the testator did not own or that they name some person as beneficiary who does not exist. The rule here, likewise, is that no evidence of intention is admissible to clear away the ambiguity.[28] However, this form of ambiguity may be evaded in another

[26] Kurtz v. Hibner, 55 Ill. 514.

[27] Karsten v. Karsten, 254 Ill. 480, LEADING ILLUSTRATIVE CASES.

[28] Miller v. Travers, 8 Bing. 244 (Eng.); Willard v. Darrah, 168 Mo. 660.

way. The law, appreciating the unjust operation of the strict rule, has conceived the following mode of correcting mistakes:

First, as to property that is misdescribed. Suppose the will gives the "N. ½ of the S. E. ¼ of the N. E. ¼ of Sec. 24," etc. When it comes to executing the will it is found that the testator had no such property, but that he had the S. ½ of the S. E. ¼ of the N. E. ¼ of Sec. 24. The courts will execute this by permitting the letter "N" in the "N. ½" to be stricken out altogether, leaving the "½ of the S. E. ¼ of the N. E. ¼ of Sec. 24," if thereby the description fits property that the testator owned not otherwise disposed of by will. This is called the doctrine of *falsa demonstratio non nocet,* that is, a wrong description does not hurt the devise if, after striking out the erroneous part, enough remains to point out the property.[29] Some authorities go the length of requiring that, in order for the rule to work, the testator must refer to the property as his, thus: "My property in X state known and described as," etc. The reason for this is that, otherwise, for all that appears, the testator might have been trying to dispose of property he did not then own but expected to purchase afterwards and did not. The better rule, however, possibly is that if, after the striking out, enough remains to fit property the testator owned, it is sufficient. Thus, if the will gave "the N. ½ of the S. E. ¼ of the N. E. ¼ of Sec. 24," and instead the testator owned the N. ½ of the S. W. ¼ of the N. E. ¼ of Sec. 24, no amount of

[29] Wiseman v. Green, 127 N. C. 288; Gano v. Gano, 239 Ill. 539.

striking out would fit the property the testator really owned.[30]

Second. The other situation is that where the beneficiary or legatee is misnamed. Here evidence may be introduced not of the intention of the testator, but that the testator was during his lifetime in the habit of calling a certain person by the name which appears in the will. This will identify that person as the legatee or beneficiary intended by the will.[31] Thus where the testator gave property to "John, my friend," and it appeared he had no friend by name of John, but had one by name of James, it was proper to show that he always called this friend, "John."

Section B. Form of the Will.

77. **In general.**—The form of the will is governed strictly by statute. The student is, therefore, referred to the samples of statutes, in this connection, for distinctions between the rules under these three statutes will be drawn from time to time.

78. **Same subject—Signature.**—It is to be noted that each of these statutes, the Statute of Frauds, the Wills Act, and the Illinois Statutes of Wills, requires a signature. The Statute of Frauds provides that the will shall be in writing and "signed by the party devising the same." The Wills Act provides "it shall be signed at the foot or end thereof." The Statute of Wills provides "it shall be signed by the testator." In this connection it is to be observed that each statute provides that the signing may be

[30] Graves v. Rose, 246 Ill. 76.

[31] Willard v. Darrah, 168 Mo. 660; Coon v. McNelly, 254 Ill. 39.

by some person other than the testator, but at his express direction and in his presence. That is merely a statement of the common law, for deeds, bonds and contracts may be thus signed, the theory being that the "other person" acts not as agent, but as an instrument, the testator using him just as he would a pen or a pencil, or any other instrument with which to write.[32]

79. **Same subject—What is signing?**—The first question is, what is a signature? Must it be a writing in ink and with a pen; may it be a blot; may it be written with pencil? Possibly a proper definition would be "the introducing of foreign substance upon paper or parchment with the intent to make a signature." Thus, blood, ink, or lead may be used, and any mark is sufficient so long as made with the intention to add a signature.[33] However, there must be the intention to add the signature, and where the intention is merely to make a mark for a seal, it is not enough.[34] But where the intention to make a signature appears, any mark within the above definition is enough. Thus, a stamp was held sufficient.[35]

80. **Same subject—Where the signature should appear.**—Where, then, should the signature in the will appear? Must it appear at the end of the will, or is it sufficient if it appears in the body somewhere? That depends entirely upon the statute under which the will is drawn. If under the Statute of Frauds or under the Statute of Wills, it is suffi-

[32] Riley v. Riley, 36 Ala. 496.
[33] Everhardt v. Everhardt, 34 Fed. 82.
[34] LeMayne v. Stanley, 3 Lev. 1 (Eng.).
[35] Jenkins v. Gaisford, 3 Sw. & Tr. 93 (Eng.).

cient if the signing has been done somewhere in the body of the will, not necessarily at the foot.[36] Under the Wills Act, and statutes of that type, however, the signature must be at the foot of the will. The question then occurs, when is the signature at the foot of the will? It seems that the testator may leave a slight space blank between the written matter of the will and the name, but he may not leave a whole page blank between them.[37] In one case the testator signed his name at the end of the will, but the ninth, tenth, eleventh and twelfth clauses were written in the margin though above the signature. It was held that the signature was at the foot of the will within the meaning of the statute.[38] In another case the will was found in the form of four sheets pinned together, the sheet pinned on top being apparently the fourth sheet and bearing the attestation clause and the signature. The court held that this sheet was properly the end sheet, that the four sheets were loose at the time the will was drawn, and that the signature appeared at the foot.[39]

81. **Incorporation by reference.**—So much for the requisites of signing. The next essential inquiry is as to what are the contents of the will. Of course, no question could here arise if the contents of a will were confined to what appears written on the particular paper or instrument entitled "Last Will and Testament." But oftentimes the testator in his will refers to other papers, or future acts, as

[36] LeMayne v. Stanley, 3 Lev. 1 (Eng.).
[37] Albright v. North, 146 Cal. 455, LEADING ILLUSTRATIVE CASES.
[38] In re Swire's Estate, 225 Pa. 188.
[39] In re Goods of Madden, (1905) 2 Ir. 612 (Irish).

indicating the disposition of certain of his property, and the question here always is, does this other paper, or future act, thus referred to, become a part of the will?

At this point it might be well to mention what must already be apparent from the text of the statutes hereinbefore set out. A will in order to be good must conform strictly to the statute. Most statutes provide (a) that the will be in writing, (b) that it be signed by the testator, (c) that the testator acknowledge it to be his will, (d) that (b) and (c) be done in the presence of witnesses (two or more, according to the particular statute), who must be present at the same time, (e) that the witnesses must then sign (1) after the testator and (2) in the testator's presence, and (3) in some jurisdictions the witnesses must sign in the presence of each other.[40] When a testator in a duly executed will refers to some other paper, which paper is not duly executed (perhaps not attested), the objection at once arises that to permit him to do that would enable him to evade the statute requiring that a will be executed with all formalities. Is such objection sound?

82. **Same subject—Under the Statute of Frauds.** —It is to be noted that under the Statute of Frauds only wills of real estate were required to be witnessed by three or four credible witnesses. Under this act a situation arose like this: A, the owner of real estate, made a will duly executed and attested as provided by the Statute of Frauds, in which will he

[40] These various steps will be treated in detail hereinafter, and are mentioned in this connection only to lend force to the explanations of incorporation by reference.

provided that the property should go to B, subject, however, to the payment of all his debts and legacies. Afterwards he executed a simple writing, unattested, in which he directed that $1,000 be paid to C. Then A died. The question arose, was C entitled to the $1,000, or was his bequest invalid because the testator was trying to make the $1,000 a charge upon his real estate without executing an instrument such as the statute provided? It was held that when he executed his will in which he expressly and in general terms made his real estate liable to all his debts and legacies, he at that time created a charge upon his real estate which was valid because in an instrument properly executed; that, once created in a proper manner, the charge became personalty, and that a subsequent writing, even though unattested, which merely directed how that charge already created should be applied, was not a disposition of real estate, but one of personal property.[41] The subsequent simple writing, referring to personalty, was valid.

Where, on the other hand, a validly executed will contained a provision that the trustees under this will should pay off all such legacies as he, the testator, should thereafter charge upon the property, and the testator afterwards added a simple writing not executed in conformity with the Statute of Frauds so as to pass real estate, in which he charged his estate with $1,000 per year to be paid his wife, and died, this legacy to his wife was held invalid because the charge was not created until the time

[41] Hannis v. Packer, Ambl. 556 (Eng.).

of the unattested writing.[42] The distinction may possibly be explained in another way. The test of whether the subsequent unattested writing is an attempt to create a charge upon real estate is to be determined by the inquiry, What is the sole object of the testator in making the unattested writing? If it is to create a legacy or to charge one on the real estate, then it is bad, but if it is merely a direction how to dispose of a legacy or charge already created, it is good.

83. **Same subject—Under the modern type of statute.**—Under the more modern types of wills statutes, such bequests are impossible for the reason that, under these statutes, wills of personal property as well as of real estate must be attested by two or more witnesses. However, a situation analogous to that set forth in the preceding section may arise. Suppose that a testator executed a will in all respects complying with the statute so as to pass property, and in his said will provided that certain property should go "to such persons as should be his partners in business at the time of his death," or "to such persons as should be his servants"; suppose also that he gave another piece of property "to such a person as he should appoint." The provision as to the partners or servants would be good, but the other provision would be bad.[43] The test is, What was the sole object? If it was to give a legacy or devise by some unattested act performed after the execution of the will for the purpose of giving a

[42] Rose v. Cunnynghame, 12 Ves. 29 (Eng.).
[43] Stubbs v. Sargon, 3 Myl. & C. 507 (Eng.).

legacy, the provision is bad; but if the sole object of the after-performed act was not to give a legacy but to serve some other purpose, and the appointing of the legacy was merely incidental, it is good. Thus the act of entering into partnership could not be said to have for its sole object that of giving a legacy, nor could that be said of the act of appointing servants; but the act of designating a person to take a legacy can only have that for its object.

84. **Same subject—Reference to another but unattested document.**—Another situation often arises. Suppose that the testator in his will provides "that $1,000 shall be paid to such persons and in such proportions as shall appear from a paper which will be found with my will." At the death of the testator a paper unattested and unsigned is found with the will, bearing a date one year subsequent to the date of the execution of the will. Such provision would be ineffectual to pass the $1,000, for if it could do so, that would enable one to evade the wills law and to bequeath property by a simple memorandum which he could change from time to time, or which others besides the testator might change. Suppose now that the paper thus referred to in the will is dated the day before the will, and it can be proved that at the time the will was executed, the paper therein referred to was already in existence. Even this does not admit it as part of the will or make it a valid testamentary provision. The question then occurs, Can such a paper, referred to in a will, ever operate as a valid provision of the will? The answer must be in the affirmative if certain rules be observed.

1. The will must refer to the document in such terms that it can be identified.

2. The will must refer to the document as existing.

3. The document must actually have been in existence at the time the will was executed.

First, the will must refer to the document in such a manner that there is no doubt of the instrument intended. In one case[44] the testatrix made an instrument which she styled her last will and testament, but which was not executed in form as required by statute. Later she drew up a codicil which she styled, "This is a codicil to my last will and testament," and this codicil she executed properly. It was held that the paper before made and styled her last will and testament was thereby validated, as the codicil sufficiently described it. Secondly, the will or codicil must refer to the document as existing, as, if it does not do that, the paper will not be incorporated, even if as a matter of fact it is in existence.[45] Thirdly, the document must, as a matter of fact, have been in existence at the time of the execution of the will or codicil, for, if it was not, even though the will referred to it as then existing, it would not be incorporated.[46] Now suppose that the testator refers to notes signed by him in favor of those whom he wishes to make beneficiaries of his will, as where he provides that "any note or notes signed by me in favor of any person or persons and made payable by the terms thereof

[44] Allen v. Maddock, 11 Moo. P. C. Cas. 427 (Eng.).

[45] Bryan's Appeal, 77 Conn. 240, LEADING ILLUSTRATIVE CASES.

[46] Goods of Truro, L. R. 1 P. & D. 201 (Eng.).

after my decease, be recognized and treated as bequests in behalf of the payees therein respectively designated. * * * I have heretofore, and may hereafter, adopt this means of designating the persons I wish to be remembered as beneficiaries." Such a provision, it is to be noted, describes the papers sufficiently, and refers to some of them at least as existing, and all that is necessary is to prove that those notes actually presented for probate, were, as a matter of fact, in existence.[47]

Another point must not be overlooked before passing by this particular subject. Suppose that a will is made, duly executed, referring to a document as then existing and sufficiently describing it, but that the provisions made and stated in this document cannot operate because, as a matter of fact, the document was not at the time in existence. Suppose that after the document did come into existence a codicil to the will was properly executed. As will appear from what follows, such codicil would act to republish the will and make it speak from the date of the codicil, and speaking from the date of the codicil the will would refer to a paper as existing which was actually existing, and the paper would therefore be incorporated into the will.[48] On the other hand, if the will does not refer to the paper as then existing, a codicil merely republishing the will does not incorporate the paper, unless the codicil supplies the missing point, that is, unless the codicil contains a recital that the paper is existing.[49]

[47] Keeler v. Merchants' Trust Co., 253 Ill. 528.

[48] Goods of Truro, L. R. 1 P. & D. 201 (Eng.).

[49] Goods of Smart, L. R. (1902), P. D. 238 (Eng.).

85. **Same subject—Advancements.**—There is one exception to the rule, and that is in cases where the testator provides that advances are to be deducted from the shares of the beneficiaries, and refers to a paper as setting forth the amounts thereof. Such paper will be admitted in probate, not as a will or part of a will, but as part of the testator's accounts, for it is the theory of the law that gifts to beneficiaries during life may be deducted from the bequests where that appears to be the intention, and shall be where they are children of the testator unless a contrary intention is shown. Therefore, such paper would indicate what amounts should be deducted from the various legacies unless the legatee proved that he had not received the advances.[50]

86. **Attestation—Competency of witnesses.**—The next question relates to the attestation of the will. The competency of the attesting witnesses will first be discussed, the number being governed strictly by and varying with the particular statute under which the will is drawn. As a general rule it might be stated that any person may be an attesting witness to a will who has no beneficial interest in the will. Suppose then that one had a beneficial interest in the will; that is, suppose he was a legatee, and then served as one of the attesting witnesses. At common law, if there were not sufficient attesting witnesses without him to conform to the number required by the law, the will would be void.[51] Under modern statutes the will is not void, but the attest-

[50] Moore's Case, 61 N. J. Eq. 616.

[51] Holdfast v. Dowsing, 2 Str. 1253 (Eng.).

ing witness is not permitted to take anything under the will. Suppose, now, that the wife or husband of one of the attesting witnesses received a bequest under the will. Inasmuch as, at common law, husband and wife were considered one, this at common law rendered the will void equally as if the attesting witness himself received the legacy under the will.[52] Even under modern statutes, this latter objection has not, in all cases, been overcome. Thus where the statute provided that "all beneficial devises, legacies and gifts, made or given in a will to a subscribing witness thereto, shall be wholly void, unless there are three other competent witnesses to the same," the will was not void, as it was at common law, because an attesting witness was a beneficiary, but the particular bequest, devise or legacy to the attesting witness was void unless there were sufficient witnesses otherwise, and the will otherwise was good. However, if the bequest, devise or legacy happened to have been given to the husband or wife of the attesting witness, the whole will was void just as at common law and the statute did not apply.[53] Many statutes have remedied this, however, and specially provide that where the gift is to the husband or wife of an attesting witness, the gift only and not the whole will shall be void.[54]

At common law, one who committed an infamous crime could not testify, but if he became a witness

[52] Holdfast v. Dowsing, 2 Str. 1253 (Eng.).

[53] Sullivan v. Sullivan, 106 Mass. 474; Giddings v. Turgeon, 58 Vt. 106; Fisher v. Spence, 150 Ill. 253; Hatfield v. Thorp, 5 B. & Ald. 589 (Eng.); Winslow v. Kimball, 25 Me. 493.

[54] See Wills Act above, § 15; also Woerner, Amer. Law of Adm. (2nd ed.), § 41.

before committing the crime, while he could not testify, his signature could be proved, and the will thus established.[55] That was because he was not competent as a witness for any purpose. Therefore, even under the modern rule, such a person is not competent in those jurisdictions where he would be disqualified to act as witness in any capacity and in any kind of a suit, but in other jurisdictions where the commission of the crime does not disqualify him as a witness in lawsuits, he would be equally competent to attest a will.

It seems that under the modern law the father, son or other relative of a beneficiary is a competent witness. The husband or wife of the one making the will is not, but the father, son or daughter or a relative, is competent. The husband or wife of the testator is not competent even under modern law because even today, husband and wife are not able to testify for or against each other in ordinary lawsuits except in certain cases, and as attesting witness, a husband or wife would indirectly testify for or against the testator.[56]

87. **Same subject—Who takes a beneficial interest?**—The question then arises, When does an attesting witness take a beneficial interest? Of course there is no doubt but that he does when he is a legatee or a devisee under the will. Does an executor come within the inhibition? At common law he was a good attesting witness, where he was not a resid-

[55] See subject, EVIDENCE; Sears v. Dillingham, 12 Mass. 358, LEADING ILLUSTRATIVE CASES.

[56] Pease v. Allis, 110 Mass. 157; Slingloff v. Bruner, 174 Ill. 561, 51 N. E. 772, husband of testator's sister is competent.

uary legatee, and had no beneficial interest in the estate. Under the modern rule, an executor is a competent attesting witness, even though he is entitled to compensation for his services as such, though there are some authorities to the contrary. Where the executor is competent, his wife is also, but where he is incompetent, his wife is incompetent.[57] However, the executor like other attesting witnesses, still is incompetent where he is the recipient of a gift or devise under the will.

88. **What is attestation?**—The inquiry follows, What is meant by attestation? What is the operation of attesting? Generally speaking, the attesting witness attests to the fact that the testator has made his will. However, different statutes require different formalities of attestation. Thus, one statute might require that the will be attested; another may require that the signature only be attested. The general rule is that if the attesting witness sees the testator sign the instrument, that would be at once an acknowledgment of the testator that it was his will and also that it was his signature, and the attesting witness, then signing in the presence of the testator, would be attesting the will and the signature as well. Under statutes of the type of the Statute of Frauds and the Illinois Statute of Wills, it is sufficient if the testator acknowledges to the witness before the witness signs, that the instrument is his will, even though the witness does not see the signature; and it is a good attestation under that type of statute if the attesting witness signs in the pres-

[57] 40 Cyc. 1113.

ence of the testator, even though no word is spoken.[58] This is on the theory that the acts of the parties amount to an implied acknowledgment by the testator that it is his will. In fact, under this type of statute it is held that the attesting witness need not even know that the instrument is a will.[59] Under statutes of the type of the wills act, however, the mere acknowledgment by the testator that it is his will, is not enough, even if express, so long as the attesting witnesses do not see the signature, because under this type of statute the signature must be attested.[60] But if the signature was visible, even if no express words were used acknowledging that that was the testator's signature, so long as the witness signed in his presence, the will is good.[61]

As to a will, some statutes require that the testator acknowledge "the making thereof" and in such cases the testator must either make the acknowledgment by word of mouth or give some sign of assent to the statement of the scrivener that he acknowledged it.[62] Thus it appears much depends upon the phrasing of the particular statute.

89. **Attestation must follow the act attested.**—So under the Statute of Frauds and other acts of that particular type, the attestation is to the will, and if the will is acknowledged, it is immaterial whether the will be signed before or after the attesting wit-

[58] White v. Trustees of Brit. Museum, 6 Bing. 310 (Eng.).
[59] In Re Claflin's Will, 75 Vt. 19, LEADING ILLUSTRATIVE CASES.
[60] Goods of Gunstan, 7 P. D. 102 (Eng.).
[61] Daintree v. Fasulo, 13 P. D. 102 (Eng.).
[62] Manner's Case, 72 N. J. Eq. 854.

nesses sign.[63] Under statutes of the type of the Wills Act, however, the attestation being of the signature, the testator must sign first.[64] Under all statutes, the attesting witnesses must all sign in the presence of each other, that is, all must be present at the same time.[65] As to what amounts to signing in each other's presence, it appears that they must actually sign their names, for in one case one witness signed the will alone in the morning, and in the afternoon he appeared again with the other witness, when the other witness signed his name in the presence of both, and the first one completed the cross to the letter "F" in his name and added the date. It was considered that the two witnesses had not both signed in each other's presence, for the making of the cross to the "F" was not the signing, the signing having occurred before, out of the presence of the other. The will was held bad.[66]

90. **Attestation must be in the presence of the testator.**—It is to be noted that wills statutes, as a rule, all require that the attestation be in the presence of the testator. The statement appears simple enough, but considerable difficulty has been experienced to know when an attestation occurs in the presence of the testator and when not. Suppose the testator is at one end of a large room and the witnesses at the other end, out of sight and earshot; suppose they attest in another room; or suppose that the testator is deaf, or blind, or both deaf and

[63] Lacey v. Dobbs, 63 N. J. Eq. 325.
[64] Same case as in note 63.
[65] Moore v. King, 3 Curt. 243 (Eng.).
[66] Hindmarsh v. Charlton, 8 H. L. C. 160 (Eng.).

blind. It is apparent the question is not so simple as at first it might have appeared.

Various rulings were accordingly had, from which the following is submitted as a statement of the rule to be followed in answering the difficulty. The rule resolves itself into two parts: First, no attestation is good no matter where or under what circumstances it is made, unless made within the zone of the particular testator's perception, that is, unless it is done within that area in which the particular testator may perceive, by any one of his senses, the action or the presence of the attesting witnesses. Second, if the attestation is in an adjoining room and not in the same room, then in addition to the above, the acts of attestation must also be in the line of vision of a normal individual in the situation of the testator. Thus, where the will is executed by the testator in the same room where the witnesses are, and they attest in that room, he being there, it is not essential to the validity of the attestation that he see them sign, so long as he is near enough to be able to perceive of their act from contiguity of presence, as by hearing, or feeling; namely, where they are in the zone of his perception.[67] In one case[68] the testator could not see the attesting witnesses sign on account of the curtains around the bed, which were drawn, but the attestation was sustained. In another case,[69] the testator becoming exhausted, the witnesses retired into the adjoining

[67] Riggs v. Riggs, 135 Mass. 238; Ellis v. Flannigan, 253 Ill. 397; Cunningham v. Cunningham, 80 Minn. 180, LEADING ILLUSTRATIVE CASES.

[68] Newton v. Clark, 2 Curt. 320 (Eng.).

[69] Goods of Colman, 3 Curt. 118 (Eng.).

room which communicated with the testator's room by folding doors which were open. The attestation was done on a table so located that testator could not possibly see it. The attestation was not good.

In another case, however, the testatrix was blind and the acts of attesting occurred in an adjoining room. Because it appeared that the testatrix could have seen had she been possessed of the sense of sight, the attestation was good; for it was done in the line of vision of a normal person in the testatrix's situation.[70] What, then, is meant by the line of vision of a normal person in the testator's situation? Imagine a testator in one room sitting facing a direction opposite to that of the door leading to the adjoining room where the attestation was done, so that, sitting in the position he had taken, the testator could not see the act of signing by the attesting witnesses. Had he turned his chair around so as to face in the opposite direction he might have seen the act. Would that be in the line of vision? The rule appears to be that it would not and the act of attestation would not be good.[71] However, where he might have seen by merely turning his head, it would be good.[72] One further point must be mentioned. By the line of vision, it is not required that the testator, a normal person in his situation, must actually see the attesting witnesses write, but he must see or must be able to see enough of the acts of the witnesses to know that they are writing, and

[70] Goods of Piercy, 1 Rob. Ecc. 278 (Eng.).

[71] Norton v. Bazett, Deane 259 (Eng.).

[72] Graham v. Graham, 10 Ired. 219 (N. C.); In Re Beggans' Will, 68 N. J. Eq. 572, LEADING ILLUSTRATIVE CASES.

merely seeing their backs is not enough.[73] In a Minnesota case[74] it was held that it was sufficient if the testator could have seen the act of signing by the witnesses, by moving his position two or three feet. The will as signed by the witnesses was shown to the testator after the signing. The court argues that there is no sense in the distinction between moving the head and changing the position of the testator, where, as here, the testator was physically capable of stepping two or three feet forward.

91. **Testator's intention.**—The case of the will that was intended as a joke or a fake should be mentioned. According to the law of contracts, a contract entered into as a joke, where both parties were insincere at the time or must have been so, is no contract; a marriage so entered into, is invalid where no cohabitation follows the marriage. So a will executed as a joke or as a subterfuge or blind, will be set aside. Thus where it appeared from the evidence that the testator had told the scrivener that the will "was a fake, made for a purpose," it must be taken to mean that what had been done was a sham. This rendered the will void, unless the testator subsequently re-acknowledged the will *animo testandi* (with intention of making a will).[75]

[73] Graham v. Graham, 10 Ired. 219 (N. C.).

[74] Cunningham v. Cunningham, 80 Minn. 180, LEADING ILLUSTRATIVE CASES.

[75] Fleming v. Morrison, 187 Mass. 120.

CHAPTER VIII.

REVOCATION OF WILLS.

92. **By subsequent instrument.**—Just as the making of a will is governed by statute, so is the revocation of the will. Prior to the enactment of the Statute of Frauds in England, a will was revocable by parol.[76] The Statute of Frauds, however, contains a provision that no will of real estate shall be revoked except "by some other will or codicil in writing" duly attested, or "by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent." Other statutes have substantially the same provisions. A will of personalty, under the Statute of Frauds, could be cancelled by an unattested writing.[77] It is to be noted that in the other statutes it requires an attested instrument to revoke it just as in case of real estate. It is to be noted, also that under the Statute of Frauds, a will of personalty might be revoked by words not in writing if the words are reduced to writing and proved by three witnesses. This is not true of modern statutes, for at the present day, revocation of wills of personalty is, as a general rule, attended with the same formality as revocation of wills of real estate.

[76] Brook v. Warde, Dyer 310b (Eng.).
[77] Walcott v. Ochterlony, 1 Curt. 580 (Eng.).

Now, then, as to when a will is revoked by some other will or codicil? It appears that merely making another will, though duly attested, is not sufficient. In order to operate as a revocation, the other will must either expressly revoke the prior will, or dispose of the same property attempted to be disposed of in the prior will. Otherwise, both would stand, as it is conceivable how there may be two wills made by the same testator provided they are not inconsistent with each other.[78] Even if two wills are in part inconsistent, they will still stand together as to those parts that are not inconsistent, and as to the parts contradictory, the prior one will stand revoked. And this is true notwithstanding the later will recites itself to be the "last will."[79]

Whether a subsequent will in terms revokes the earlier will, though it is not inconsistent, is a question to be ascertained not from the form of the documents but from the intention of the testator as gathered from the body of the will.[80] In one case[81] a testator died leaving three instruments, all duly executed and attested, and each of a different date. The earliest in time disposed of all the testator's property. The next in time was executed on a printed form commencing: "This is the last and only will and testament of me, John Foxon." This instrument disposed only of a life insurance policy. The latest instrument was "a codicil to the last

[78] Hitchins v. Basset, 2 Salk. 592 (Eng.).

[79] Freeman v. Freeman, 5 DeG. M. & G. 704 (Eng.); contra, Plenty v. West, 17 Jur. 9 (Eng.).

[80] Lemage v. Goodban, L. R. 1 P. & D. 57 (Eng.).

[81] Simpson v. Foxon, (1907) P. 54 (Eng.), LEADING ILLUSTRATIVE CASES.

will." This gave certain bequests not inconsistent with those in the two preceding instruments. The question raised was whether the words of the printed form in instrument No. 2, "and only," operated to revoke the earliest will. The court held that that had not been the testator's intention, as to hold so would render the bulk of the estate intestate.

93. **By destruction.**—A will may also be revoked by destruction and cancellation. By destruction is meant burning, tearing or obliterating, or otherwise destroying the instrument. With reference to tearing, it appears that merely showing the will torn is not enough to make out a case of revocation by tearing. It is necessary also to show that the will was torn by the testator and that when he tore it he had the *animus revocandi,* that is, he had the intention of revoking the will by that act.[82] The same is true of burning.

There is another mode, and that is obliteration, as where the testator strikes out the words of the will with a pen and ink, and here it seems that even a part of the will may be revoked by striking out, for the statutes provide that a will, or "any clause thereof," may be so revoked,[83] and a clause may be a single word, so long as such omission leaves the rest intelligible.[84]

This rule that any part of a will may be stricken out, even one word, if it leaves the rest of the will intelligible and if done *animo revocandi,* must be

[82] Bibb v. Thomas, 2 W. Bl. 1043 (Eng.).
[83] Larkins v. Larkins, 3 B. & P. 16 (Eng.).
[84] Swinton v. Bailey, 4 App. Cas. 70 (Eng.).

tempered with the reservation that the prime object of striking out must be to revoke the particular bequest, and not to enlarge some other bequest. Thus, if the effect of striking out is to reduce the particular devise from an estate in fee simple to one for life, and the only way in which any other bequest might be increased would be by the balance of the estate falling into the residue and being thus distributed, it is permissible;[85] but where the effect is virtually to change the devise or bequest from one person to another, it is not good, as amounting to the making of a new will without the formalities required by the statute. Thus where a will originally gave property "To my sons A, B, C and D equally," it would be improper to cancel the names C and D, as that would directly increase the devises to A and B. But if the will read, "To my sons A and B ½ and to my sons C and D ½" and the testator struck out the part "To my sons C and D ½," that would be good, even though A and B would profit by having their shares increased by reason of the ½ falling into the residue and then being divided as residue. But where the testator had sons A, B, C and D and drew a will consisting of two clauses only, as originally drawn, the first of which was a clause giving designated property to A and B and the second of which a residuary clause, giving all the residue of his estate to C and D, he could not strike out all of the first clause even though C and D would then take only by virtue of

[85] Swinton v. Bailey, 4 App. Cas. 70 (Eng.); Bigelow v. Gillott, 123 Mass. 102.

the residuary clause, because that would on its face be an evasion of the law and it would leave nothing but the residuary clause in the will.[86] Where, as in the last instance, the testator strikes out a word or words so as to directly increase another's share, the striking out will be ineffective, and the will stands as originally drawn.[87]

94. **What constitutes destruction?**—As appears above, in order for a revocation to be accomplished by burning, tearing, or obliterating, there must be the *animus revocandi,* and this *animus revocandi* must continue until the act of destruction is complete. Thus in one case the testator had torn his will into bits with the intention of revoking it, but before he had thrown the bits of paper from him, and while he still had them in his hand, he was prevailed upon to desist.[88] It was held that he had not effected a revocation, as the *animus revocandi* ceased before the destruction was completed. But even where the *animus revocandi* continues, if there is not destruction at all, there can be no revocation. Thus where the testator had thrown a will upon the fire with the intention of burning it up, and a beneficiary under the will rescued it before any of the writing had been burned into, it was not revoked.[89] It seems that if the writing is torn into or burnt into, and the *animus* is there, that is enough, but if the corner or the margin only is destroyed, leaving the

[86] Miles' Appeal, 68 Conn. 237, LEADING ILLUSTRATIVE CASES.

[87] In re Kissam's Will, 59 Misc. Rep. 307 (N. Y.), LEADING ILLUSTRATIVE CASES.

[88] Doe v. Perkes, 3 B. & Ald. 489 (Eng.).

[89] Doe v. Harris, 6 A. & E. 209 (Eng.).

will proper intact, there is no revocation. There must be such injury with intent to revoke, as destroys the entirety of the will.

Suppose now that the name, signed at the foot of the will, alone is cut out by the testator, *animo revocandi.* Clearly under the Wills Act that would be such injury with intent to revoke, as destroys the entirety of the will, for it was seen that under that statute the name at the foot is an integral part of the will.[90] Is that sufficient under those statutes requiring merely that the testator sign? It has been shown that under such statutes the name may appear anywhere in the body of the will and if the testator writes the will in his own hand and starts it, "This is the last will and testament of John Jones," the signature at the foot is unnecessary under statutes of the type of the Statute of Frauds and the Illinois Statute of Wills. Of course if the signature at the end is the only place in the will where the testator has written his name, the result would be the same as under the Wills Act, but even when the testator has written his name in the body of the will in his own handwriting, if he then signed his name at the foot, he thereby made that a part of the will and cutting out that signature would be an injury destroying the entirety of the will. Thus where a will consisted of four sheets of paper, on the last sheet of which the testator had placed his name and followed it with a seal, even though the seal was unnecessary, the testator by placing it there made it part of his will, and cutting

[90] Hobbs v. Knight, 1 Curt. 768 (Eng.).

out the seal alone, *animo revocandi,* was a revocation.[91]

Suppose that a testator made a will and also a codicil to the will, and destroys the will, *animo revocandi,* and not the codicil. Does that also revoke the codicil? Under the Wills Act it did not, for by the express words of that statute, the codicil must be expressly and independently revoked, but under statutes of the style of the Statute of Frauds, the revocation of the will revoked also the writing which purported to be a codicil to that will.[92] So it has been held that revocation of the codicil revoked also the will to which it was codicil.[93]

95. **By cancellation.**—There is another mode of revoking a will, that of cancellation. This is accomplished by writing "cancelled" or words equivalent thereto on the will, and this, if accompanied by intention to revoke, operates as a revocation. Where the words are written across the face of the writing and the intention (*animus*) is there, no question can arise. The difficulty arises where the words of cancellation are written elsewhere than across the written part of the will. Suppose that the words are written on the same page, though not across the writing, but at the foot or in the margin. This would be sufficient.[94] Suppose, however, that the will consisted of four pages, the first of which had on it all the writing of the will, the second and third of which were blank, and the fourth of which was

[91] Price v. Powell, 3 H. & N. 341 (Eng.).
[92] Black v. Jobling, L. R. 1 P. & D. 685 (Eng.).
[93] In Re Brookman, 33 N. Y. Supp. 575.
[94] Warner v. Warner's Estate, 37 Vt. 356.

used as a mere wrapper leaf and had an indorsement by the attorney who had drawn it, and nothing more, and that on this fourth sheet, under the scrivener's indorsement, the testator wrote words of cancellation, *animo revocandi.* This was not sufficient to revoke.[95] The test may be, "Is the instrument, as a will, the same after the words of cancellation are written?" In the former case, it would not be. In the latter case, it would be as fully as if the envelope containing the will, merely, was so marked, or as if "cancelled" was marked on the back.

In this connection it should be remarked for purposes of emphasis, that this right to revoke, being statutory, must be performed in the mode pointed out by the statute. Thus a will not so revoked cannot be set aside on evidence that the testator wanted to revoke and was about to do so, but that he was prevented from doing so by a beneficiary under the will who used force or threats or made false representations and thus prevented the testator from accomplishing the revocation in the mode designated by law.[96]

96. **Dependent relative revocation.**—The foregoing treatment of revocation dealt with a revocation by act of parties. Such a revocation is sometimes prevented by operation of law, because the testator when he made a revocation, was acting under a mistake of fact. The cases apparently resolve themselves into three situations:

[95] Ladd's Will, 60 Wis. 187, LEADING ILLUSTRATIVE CASES.
[96] Bohleber v. Rebstock, 255 Ill. 53, 56.

(1) Where the revocation is expressly conditioned by words in the revoking instrument.

(2) Where the revocation is expressly conditioned not in words but by interpretation, namely, where the act of revocation is part of a larger act which was intended to be carried out but was not.

(3) Where, in a court of equity, a revocation will be disregarded because induced solely by a reason which failed. It is to be observed that Rule (3) would not apply in an ejectment suit.

As to Rule (1): Where a testator, in revoking a will, expressly sets out in the revoking instrument as a reason for doing so that the beneficiaries are all dead, if it appears that he was mistaken, the revocation will not become effective.[97] It must appear, however, that the reason was the sole reason for the revocation. Thus in one case a testator made a will giving his property to charity and then later revoked this will and made a second in which he recited that "being advised that my devise to the charity was void as to real estate, though not as to personalty, and being desirous to continue it, and to make further provision for better support thereof, I give my personal estate to my executors upon trust, that if it cannot be laid out in land, it may be in securities for the same charity," giving his real estate to his nephew. It was insisted that the second will in so far as it revoked the first will was expressly conditioned by words, but the court held that it was not clear whether his fear that the devise of realty to charity was void, was his sole reason

[97] Campbell v. French, 3 Ves. Jr. 321 (Eng.).

for making the change; that from the words of the second will many causes may have contributed to his reason for changing the will; for example, he may have changed his mind about his nephew, or the estate may have grown in size in the interval between the making of the two wills. So the second will stood and the first was revoked.[98] It is to be noted that this rule applies only where the revocation is by another will or by codicil.

Rule (2) is self-explanatory. It is commonly invoked where a testator calls in his lawyer to change his will and then draws a line through his signature on the old will and makes alterations on the face, with the expressed understanding that a copy of the will as altered be made and that he then execute it before the required number of witnesses. Suppose then that the testator should die before the altered will is drawn up and executed. It is at once apparent that here the act of cancelling the old will was only part of the larger act, to wit: the drawing of the altered will, which was never carried out. Therefore the law holds that the old will shall stand as if uncancelled.[99] This situation must not be confused with that where the testator absolutely revokes his will, with the intention, it is true, of some time in the future drawing a new will. There the revocation of the old will is not prevented by the failure of the testator to make a new will, for it cannot be said that his revocation of the old will is part of and conditioned upon the making of

[98] Atty. Gen'l v. Lloyd, 1 Ves. Sr. 32 (Eng.).
[99] Goods of Applebee, 1 Hagg. Ecc. 143 (Eng.).

a new will. For all that appears, the testator wanted to cancel the old will at all events, whether he later made another will or not. Therefore if the indications are that the testator would prefer to die intestate rather than to have the old will stand, Rule (2) will not apply.

It is sometimes difficult to say when the testator's act of revoking his old will is part of a larger act that is not carried out, and when it is an independent act without reference to the later act of making a new will. In one case a testator a few days before his death gave instructions to a solicitor for a new will, and after sending for the old will, cut off the signature, and when the solicitor remonstrated, he stated that he meant to cancel the will as he was going to make a new will. The deceased, further, was alleged to have expressed himself to the effect that he understood that the cutting out of the signature from an old will was a necessary preliminary to making a new one. After he had thus mutilated the old will, the deceased made a statement that his sole reason for desiring to make a new will was his desire to increase a certain legacy. The instructions given to the solicitor, however, covered other alterations, and the solicitor prepared a draft of a new will, but the testator died before it could be executed.[1] The court submitted the case to the jury on two questions, substantially those above suggested, and the jury found that the act of revoking the old will was part of the larger act of making a new will. Since the new will was never made, the

[1] Dixon v. Sol. to The Treasury, (1905) P. 42 (Eng.).

old will was held good and the revocation did not become effective. It would appear from the last case cited that the question is one of fact for the jury.

As to Rule (3): The second rule deals with no mistake of fact but rather with mistake of intention. The first and third rules deal with mistakes of fact or of law, the only difference between the two being that in the first rule the mistake is set out in the revoking instrument, and in the third it is not set out in the revoking instrument but appears from the circumstances, or there is no revoking instrument. It becomes important, then, to examine some examples of this third rule, for it is under this third rule that the large majority of these dependent relative revocation cases fall. It appears that this rule is generally enforced in courts of equity as distinguished from courts of law, but doubtless is enforced also in courts of probate. It is to be noted that this rule applies where the act of revocation was induced solely by a reason which failed. The difficulty then is in determining not whether the reason failed, but whether the reason that failed was the sole reason. That, of course, depends upon the circumstances, and could not be better explained than by setting out some examples. Thus in one case a testator, having made a first will in which he wanted to make some slight alterations, made a second will revoking the first, and tore up the first, *animo revocandi.* The second will turned out to be invalid because not attested to in presence of the testator. It was held that the revocation of the first will was induced solely by a reason that

failed, to wit, the belief that the second will was valid, and so the revocation was not effective.[2]

Where, on the other hand, the testator made a first will giving bequests to certain religious charities, and afterwards revoked this will by a second will in which second will he gave bequests to a different religious charity altogether, the fact that the gift to the charity in the second will was void because that charity could not take, did not revive the first will.[3] The distinction is, that in the former example the testator intended merely slight changes in his will, but wished the bequests in the original will the same in the main. Thus it was irresistible that his revocation of the first will was induced solely because he was making a second one. That cannot be said of the latter situation, where the will was changed completely. For all that appears in this latter case, the testator would have preferred to die without any will rather than to let the first will stand. In another case at the death of the testator the will was found with an erasure and the name of the sister of the testator written in place of the name that was erased. Of course, the sister could not take, for to permit her to take would be permitting a change of the will without complying with the statute as to due execution of a will. The question then arose, If the attempt to give the share to the sister by thus writing her name in after the execution of the will, failed, did the party whose

[2] Onions v. Tyrer, 2 Vern. 742 (Eng.).

[3] Powell v. Powell, L. R. 1 P. & D. 209 (Eng.); Quinn v. Butler, L. R. 6 Eq. 225 (Eng.).

name was erased take? The word "niece" had been there originally, and was the word erased. The erasure being an obliteration *animo revocandi,* constituted a revocation, and the niece could take only if it could be shown that this revocation was induced solely by a reason that failed. What reason then was it that failed? Clearly the belief that the sister would take. But was this the sole reason? Could it be said that the testator would have wished that no one took rather than that the niece took? As throwing light upon that, evidence was introduced that at the time the will was drawn with the word "niece" in it, the sister, mother of the niece, was ill and not expected to live, and that subsequently and before the death of the testator, she recovered. This was considered sufficient by the court to show that the belief that the bequest to the sister was good, was the sole reason, and the revocation was held to be inoperative.[4]

In another case a testator made a will and a codicil. On both the will and the codicil he afterward tried to change the bequests without the statutory re-execution, by pasting strips of paper over the parts he wished to change and writing other directions on the strips of paper. Thus in the will he pasted the strips over the names and wrote different names on the papers instead of those names thus obscured; in the codicil he pasted some strips over amounts and wrote different amounts on the strips instead of the amounts obscured. The court considered that this was an obliteration *animo revo-*

[4] Goods of McCabe, L. R. 3 P. & D. 94 (Eng.).

candi and so a revocation, but the question was, Did this revocation become effective, or was it induced solely by a reason that failed? As to those strips covering names, the court held that it could not be said that the testator wanted the original names to get the legacies if the substituted names could not, and so refused to set aside the revocation. In the case of the paper pasted over the amounts, the court considered that here clearly the testator wanted the persons named to get something and that the sole reason of the revocation of the old amounts was the belief that the new amounts would be effective, and so the revocation in the codicil was set aside and the amounts under the paper were given.[5] So also where the testatrix wanted to change her will because her sister died and thereupon drew her pen through various parts and added others, it could not be said that her reason for changing the will was based solely on the belief that the changes would be valid, any more than on the reason that the sister died, and so the revocation remained operative.[6]

97. **Revocation by circumstances.**—Hereinbefore have been considered acts of revocation which were within the control of the testator. There remain for consideration acts or happenings beyond the testator's control. This mode of revocation is accounted for on two different possible grounds. Both grounds require that there occur a total change in the situation of the testator's family. Once there

[5] Goods of Horsford, L. R. 3 P. & D. 211 (Eng.).
[6] In Re Knapen's Will, 75 Vt. 146, LEADING ILLUSTRATIVE CASES.

appears such total change the one ground (and the early one, now become obsolete), considers that a presumption of law is raised from this change that the testator would not want his will to stand and the will is therefore revoked unless this presumption is in some way rebutted.[7] The other and modern ground holds that there is a tacit condition annexed to each will by the law that the will should not take effect where there is such a change.[8] As to what is such a total change in the situation of the testator's family, it appears that, at common law, there must have been (1) a subsequent marriage by testator and (2) birth of children from that marriage, and either alone is not sufficient.[9]

What then is the significance of these two different theories or grounds above set out? The common law held that where the testator provided in his will for just such a contingency of a subsequent marriage and birth of children, the revocation would not become effective.[10] The one ground considered that the presumption of intention that the will be revoked was rebutted by the evidence that the testator had provided in his will for this contingency. The other theory, however, held that where the testator had provided in his will for this contingency, the revocation did not take effect because it could not be said then that there was a total change in the situation of the testator's family.[11] That was a

[7] Lugg v. Lugg, 2 Salk. 592 (Eng.).

[8] Kenebel v. Scrafton, 2 East 530 (Eng.); Marston v. Fox, 8 A. & E. 14 (Eng.).

[9] Doe v. Barford, 4 M. & S. 10 (Eng.).

[10] Brown v. Thompson, 1 Eq. Cas. Ab. 413 (Eng.).

[11] Kenebel v. Scrafton, 2 East 530 (Eng.).

case where the testator, an unmarried man, bequeathed his property to a certain spinster with whom he had had familiar relations, and to any children he should have by her. Afterwards he married her and had children, and it was held that the will was not revoked. However, where the testator makes provision only for a certain woman and not for the children he might have by her, and afterward marries her and has children by her, the will is revoked,[12] and it appears that under the modern theory, evidence to the effect that he did not wish the will to be revoked notwithstanding the subsequent marriage and birth of children, is not sufficient to prevent revocation, so that to take the will out of the rule, provision must have been made for the prospective children as well as the prospective wife. It appears also that to take the case out of the operation of the rule, the provision must have been made by some act of the testator, and it is not sufficient that the child gets property of the testator by operation of law as where the will fails to cover all of the property and to part of the property there is an intestacy whereby the child gets the property as heir.[13]

98. **Same subject—Under statutes.**—Most statutes have changed the common law rule. Many provide that marriage alone, or birth of children alone, shall operate as an implied revocation of the will.[14] Other statutes, like the one in Illinois, provide that where a child or children are born after the execu-

[12] Marston v. Fox, 8 A. & E. 14 (Eng.).

[13] Same case as in note 12.

[14] Ingersoll v. Hopkins, 170 Mass. 401; Duryea v. Duryea, 85 Ill. 41.

tion of the will, such child or children shall share equally with the others. As an example, the part of the Illinois Statutes, applicable, is referred to as follows:

Revised Statutes of Illinois, 1911, Chapter 39, § 10.—If, after making a last will and testament, a child shall be born to any testator, and no provision be made in such will for such child, the will shall not on that account be revoked; but unless it shall appear by such will that it was the intention of the testator to disinherit such child, the devises and legacies by such will granted and given, shall be abated in equal proportions to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of such testator if he had died intestate, and a marriage shall be deemed a revocation of a prior will.

Where the statute provides that the will shall be revoked by marriage unless it shall appear from the will itself that it was made in contemplation of such marriage, it does not satisfy the statute to give in evidence a marriage contract in existence when the will was made, where the will did not refer to such contract.[15] To permit it would have amounted to varying the will by parol evidence.

99. **Same subject—Miscellaneous.**—It seems that divorce is not such a change in the situation of the testator's family as to revoke a will. Thus a bequest to the testator's wife is not revoked when she subsequently obtains a divorce, if he does not himself revoke the bequest before his death.[16] In one

[15] Same cases as in note 14.

[16] Jones' Estate, 211 Pa. 364.

state the birth of a child alone, even in absence of statutory provision to that effect, was held to be such change as to revoke the will,[17] and in Illinois marriage alone is held to be revocation because in that state, if the husband dies without issue, and leaves no brothers and sisters, the wife takes all the real estate, so that marriage alone revokes a will.[18]

100. **Same subject—Married women.**—It should be noted here that at common law marriage alone, without birth of children, revoked the will of a woman.[19] That was because a woman after marriage could not make a will, and could not even make an instrument the sole purpose of which was to revoke a will made prior to marriage. It would not be presumed, then, that she intended the will to remain where she could not help doing so merely because she was powerless to do otherwise. Modern statutes have, however, given a married woman power to make a will. What is the effect of such a statute upon the common law rule that marriage alone revokes a woman's will? It has been held that under such modern statutes, marriage of a woman alone does not revoke, but there must be marriage and birth of children in order to revoke.[20]

[17] Negus v. Negus, 46 Iowa 487.
[18] Tyler v. Tyler, 19 Ill. 151.
[19] Durfee v. Risch, 142 Mich. 504, LEADING ILLUSTRATIVE CASES.
[20] In Re McLarney's Est., 153 N. Y. 416.

CHAPTER IX.

REPUBLICATION AND REVIVAL.

101. **Republication.**—What is meant by the term republication? Strictly speaking, it is the bringing the will down to date. When it is considered that under common law rules and in those states that still adhere to those rules, after-acquired real estate does not pass under a will, and when we consider, also, the rules relative to incorporation by reference, the question of whether a will has been republished or not becomes more or less important.

Republication occurs where the testator subsequently affirms or ratifies his will. Prior to the Statute of Frauds, this could be done orally even as to real estate.[21] Even under the Statute of Frauds, republication might still be oral as to personal property. Under modern statutes it requires an instrument of equal formality to a will, as a duly executed codicil, to operate as a republication of the will.

102. **What does a codicil republish?**—Granting, then, that under modern statutes, it requires either a codicil or another will to republish a prior will, is it necessary for such codicil, or later will, to refer to the prior will by apt words so as to indicate on its face an intention to so republish the early will? Doubtless that would be necessary in case of a later will. A different rule seems to prevail, at least in

[21] Beckford v. Parnecott, Cro. Eliz. 493 (Eng.).

this country, so far as a codicil is concerned. Thus it seems that a codicil to a prior will, which codicil is properly executed and attested, republishes and makes of the date of itself, the will to which it is codicil, so as to pass real estate acquired in the interim between the execution of the prior will and that of the codicil, notwithstanding the codicil makes no mention of real estate or property.[22] It seems, however, that a codicil does not bring a will down to date as regards the intention of the testator. Thus, it is the commonly accepted rule that a will is to be construed according to the intention of the testator, which intention is to be gathered only from the language of the will and the circumstances under which it was made, but that no expression of intention not contained in the will can be considered.[23] If the codicil brought the prior will down to date as to intention, it must permit the intention as it appeared from the language of the prior will, to be construed in connection with the circumstances under which the codicil or the later will was drawn. This it does not do. Thus, where a testator made a will giving his daughter $700 and afterwards, during his lifetime, gave her the $700 outright, and then died, she would not be permitted to claim $700 under the will, for her legacy would be held satisfied by advancement as an ademption (a discussion of which follows later). Suppose then, that after he made this gift outright, he executed a codicil to his prior will saying nothing about the $700 legacy or about any of

[22] Barnes v. Crow, 4 Bro. C. C. 2 (Eng.).
[23] Eyer v. Williamson, 256 Ill. 540, 544.

the legacies. It might well be argued under the above rule that the codicil, by bringing the will down to the date of the codicil by republication, would rebut the presumption that this gift was in satisfaction of the legacy, i. e., the subsequent execution of the codicil would amount to re-enacting the legacy. Such result, however, was held to amount to bringing the intention in the prior will down to the date of the codicil, which the law says the codicil does not do in the absence of express words to that effect, and so the legacy was held satisfied despite the codicil.[24]

What, then, as to the situation where a testator made a will and several codicils, and then, later, makes another codicil to his "Last Will and Testament"? Does that bring down to the date of such last codicil the will and all the other codicils to that will? The rule is that it brings down to date, with the will, all the other codicils which are themselves validly executed.[25] The reason for this is that a bad codicil is not included in the term "Last Will and Testament," but a good codicil is. Of course, where a testator has two wills that are not inconsistent, but can stand together, and then makes a codicil to "My Last Will and Testament," specifying the date of the prior of the two wills, the codicil would not republish also the other of the two wills.

103. **Revival.**—Suppose now, that a validly executed codicil refers to a will not executed and attested in conformity to the law. The old English

[24] Izard v. Hurst, Freem. C. C. 224 (Eng.).
[25] Green v. Tribe, 9 Ch. D. 231 (Eng.).

authorities hold that this operates to cure the defect in the will. Other authorities hold that a will defectively executed can never be republished by a subsequent codicil, or short of rewriting and re-executing the whole will.[26] This case distinguishes, however, between the above situation and that where the will to which the codicil was published was invalid not because the will was not duly executed, but for some other reason, such as that after the will was executed, the testator married and had a child, and afterwards made the codicil. The case held that the codicil in this latter situation brought the will down to date of the codicil so as to prevent revocation by marriage and birth of the child. This is called the doctrine of revival and not of republication. It is commonly manifested in the situation where the testator makes two wills which are inconsistent so that the latter will supersedes the former; then, afterwards he cancels the second will in some appropriate mode. It is held that upon the cancellation of the latter will, the former will which had been superseded by the latter, is revived.[27] Suppose, now, that a testator made a will, then revoked it by codicil, and afterwards made a second codicil expressly reviving the will. Under statutes such as the Wills Act, such second codicil would be inoperative to revive a will once revoked.[28]

Suppose, again, that a testator made a will, then married and had a child, then made a codicil expressly reviving the will, and then destroyed this

[26] In Re Emmons' Will, 110 App. Div. 701 (N. Y.).
[27] Goodright v. Glazier, 4 Burr. 2512 (Eng.).
[28] Newton v. Newton, 12 Ir. Ch. 118 (Irish).

codicil. The court inquired whether it was the testator's intention thereby to destroy also the revived will, and finding it was not, held that the effect of the codicil to revive the will once revoked by marriage and birth of child, was not lost by the mere subsequent destruction of the codicil without also an intention to revoke the revived will.[29] So, where a testator who made two wills, the latter revoking the former, finally made a codicil to the former, that revived the former and revoked the latter will.[30] Suppose, now, that a testator made two wills, the latter of which expressly revoked the former. Does the mere cancellation of the latter revive the former? It is to be noted that the situation here is different from that where the two wills are inconsistent and therefore the latter supersedes the former but does not expressly revoke it. The authorities on this situation are divided. One holds that such mere cancellation of the latter will does not revive the former will, unless an intention to so revive it is affirmatively shown, but that such intention may be shown by declarations made by the testator, subsequently, as to why he cancelled the latter will.[31] Other authorities hold that since a will and therefore a codicil is ambulatory until the testator's death, therefore the last undestroyed, unobliterated and uncancelled instrument extant at the testator's death is his will. In the above situation, the former will would be revived on the cancellation of the latter.[32]

[29] James v. Shrimpton, 1 P. D. 431 (Eng.).
[30] Matter of Campbell, 170 N. Y. 84.
[31] Pickens v. Davis, 134 Mass. 252.
[32] Stetson v. Stetson, 200 Ill. 601, LEADING ILLUSTRATIVE CASES.

DIVISION III

LAPSED, VOID, AND ADEEMED LEGACIES AND DEVISES

CHAPTER X.

LAPSED AND VOID LEGACIES AND DEVISES

104. **Distinction.**—What is the distinction between a lapsed legacy, or devise, and a void one? So far as the operation of the law on the rights of beneficiaries under a will is concerned, it will be seen there is but slight distinction. There is, however, a difference in definition of which it is desirable here to make mention. Inasmuch as a will is ambulatory until death; that is, inasmuch as the benefit conferred therein does not take effect until the death of the testator, the rule is that one mentioned as beneficiary in a will has no interest until the testator's death. Thus, if the beneficiary should die first, and then the testator die leaving the will unchanged, the heirs, or representatives, of the deceased beneficiary would not take the share he would have taken if he had lived longer than the testator, but instead, the share, or bequest, is held to lapse. Where the bequest then goes, it is the purpose here to discuss. The other situation occurs where the bequest cannot pass to a beneficiary even though he survives the testator, because the law says it is void.

That is a void bequest. Where such a bequest goes must be explained in connection with the similar treatment of the question of the lapsed bequest.

105. **As to legacies.**—Some little difference will be found in the treatment of this subject whether the gift is a legacy or a devise; that is, whether the subject matter is personalty or real estate. First will be considered the disposition of lapsed and void legacies. The rule is that where a legacy lapses, or where it is void, and the will has a clause disposing of the residue of the property not disposed of by the will proper, such lapsed or void legacy will fall into and swell the residuum and go as the residuary clause provides.[33] Of course, if there was no such clause, the legacy thus lapsed, or void, would be divided and disposed of just as if there was no will. It would go to the next of kin. Now, suppose that the residuary clause provided that the residuum should go to A, B, and C, and C died before the testator. It was there held that the residue could not fall into itself, and so C's share would go as in case of intestacy; i. e., it would go to the testator's next of kin.[34]

106. **As to devises—Lapsed.**—The rule as to real estate was different. It was a rule handed down from the old feudal law that a person could not will after-acquired real property.[35] Therefore, at common law, where a devise lapsed after the will was made, it was looked upon just like after-acquired

[33] Wright v. Hall, Fort. 182 (Eng.).

[34] Bagwell v. Dry, 1 P. Wms. 700 (Eng.); Lloyd v. Lloyd, 4 Beav. 231 (Eng.).

[35] See § 46 for change by statute in England and in Illinois.

property, and so could not fall into the residuum. It went to the heirs (real estate went to the heirs and not to the next of kin).[36] Under modern statutes which make it possible to pass after-acquired property by will, the common law objection is obviated, and the real estate will fall into the residue just like the personalty.[37]

107. **Same subject—Void.**—With reference to void devises, there is a conflict in the authorities. One line of authorities holds that the same rule should apply as in the case of lapsed devises, the argument being that where a devise is void it cannot be said that the testator intended it to pass as residue and therefore it must be just like after-acquired real estate.[38] Another line of authorities, however, holds that the testator must be held to have intended to pass by the will all the property he actually had at the time, and if a devise is void, it is as if it never was made, and so should fall into the residuum.[39] In the case cited the devisee was a church, and the devise was void because the church could not take. The former rule, possibly, is the most favored, but the latter, it is submitted, is based upon sounder argument.

108. **By statute.**—Statutes in some states have changed the rule so as to provide that where the testator gave a legacy or devise to a child, naming it, and that child died before the testator, instead of lapsing, such legacy or devise should go to the

[36] Lessee of Ferguson v. Hedges, 1 Harring. 524 (Del.).
[37] Molineaux v. Raynolds, 55 N. J. Eq. 187.
[38] Greene v. Dennis, 6 Conn. 293.
[39] Lessee of Ferguson v. Hedges, 1 Harring. 524 (Del.).

child's child. A section of a representative statute is appended:

Illinois Revised Statutes, 1911, Chapter 39, Page 861, § 11.—Whenever a devisee or legatee in any last will and testament, being a child or grandchild of the testator, shall die before such testator, and no provision shall be made for such contingency, the issue, if any there be, of such devisee or legatee shall take the estate devised or bequeathed as the devisee or legatee would have done had he survived the testator and if there be no such issue at the time of the death of such testator, the estate disposed of by such devise or legacy shall be considered and treated in all respects as intestate estate.

109. **Where the legacy or devise is to a class.**—Suppose that a testator gives a legacy or devise to "my children" without naming them. Under the law such is called a gift to a class, and the class is determined as of the time of the death of the testator; that is, those children living when the testator died, would constitute the class. Thus, if a testator in such a case had three children when he made his will, and one of those died before the testator, the share such child would have taken had he lived, would go neither to the residue nor to the next of kin, but the two surviving children would take it as belonging to the class of which they were the components.[40]

[40] Viner v. Francis, 2 Cox 190 (Eng.).

CHAPTER XI.

ADEMPTION.

110. **Definition.**—By ademption it is meant that the testator, after giving a legacy or devise, has in some way, before his death, destroyed or disposed of the subject matter of the bequest so that on his death the bequest cannot be carried out because nothing remains with which to carry it out. Ademption is of three kinds: revocation of devise by conveyance, ademption of specific legacies, and ademption of portions.

111. **Revocation by conveyance.**—Where a testator wills a certain piece of real estate to a devisee, and afterwards and before the testator's death, he sells and conveys the real estate and pockets the proceeds, or even where it is taken by eminent domain in condemnation proceedings and the testator receives and uses the proceeds, it is held that the devise is revoked.[41] Even if the testator puts the proceeds in the bank and then dies leaving the proceeds intact, the devisee would not get them because he was to have real estate and not the money. So, even where in his life the testator makes a contract to sell the land, the devise is revoked. Some jurisdictions have changed this by statute.[42]

[41] Ametrano v. Downs, 170 N. Y. 388.

[42] Alabama, Arkansas, Colorado, Connecticut, Georgia, Indiana, Kansas, Kentucky, Missouri, Nevada, New York, Ohio, Virginia, West Virginia. (Woerner, Am. Law Adm. (2d ed.), § 53.)

112. **Ademption of specific legacies.**—Three possible examples might be suggested to explain the rule encountered under this head: a testator may bequeath (1) "a certain diamond ring given me by A," or (2) "all my diamond rings that I now have in my vault," or (3) "all my diamond rings." Now, suppose that in example (1) the testator sold the ring given him by A. That operated to adeem the legacy so that the legatee of the ring would get nothing. Suppose that in example (2) the testator had rings in his vault at the time of making the will, then removed them from the vault subsequently and sold them, but bought other rings with the money and placed them in the vault where they remained until his death. There would here be an ademption and the substituted rings would not pass. But if he simply removed the rings from the vault and placed them in his desk where they remained until his death, the legatee would get them. Suppose in example (3) the testator had rings at the time of making the will, but sold them and used the money for other purposes, and afterwards purchased other diamond rings of different kinds and values from those he had before. The legacy would not be adeemed, but the legatee would get any diamond rings the testator might have at his death. Thus, in one case a testator bequeathed a certain number of shares of South Sea Stock. Afterwards he sold all of the stock he had, but later, before his death, bought more stock of the same kind. The legacy was not adeemed.[43] In the same case, the legisla-

[43] Partridge v. Partridge, Cas. temp. Talb. 226 (Eng.).

ture, by law, changed the stock into annuities, but this, being an act not of and out of the power of the testator, did not adeem the legacy. So, also, where property is given by a testator in his will to A in trust for B, the testator does not adeem the legacy by afterwards giving the trusteeship to C, so long as he does not interfere with the beneficial interest of B.[44]

In another case the testator in his will gave a certain bond to a legatee. Before the testator's death the obligor on the bond paid it off and at the death of the testator the will was found unchanged, but no record was found of the particular money paid off on the bond. It was held that the legacy was adeemed.[45] If, on the other hand, the testator had accepted a new bond in place of the one he had when the will was made, we would come within an analogy to the annuities case above mentioned and there would have been no ademption. But the receipt of the money and the merging of the money with the rest of his funds by the testator, was tantamount to an outright sale of the bond by the testator. Even if he had used the proceeds of this bond to buy another similar bond, possibly the legacy would still have been adeemed.[46] In the case just cited, a testator in a will bequeathed what were known as long annuities, and before his death exchanged all the long annuities for short annuities of which he already had some, in which exchange he

[44] Dingwell v. Askew, 1 Cox 427 (Eng.); In re Tillinghast, 23 R. I. 121.

[45] Fryer v. Morris, 9 Ves. 360 (Eng.); In re Bridle, 4 C. P. C. 336 (Eng.).

[46] Pattison v. Pattison, 1 Myl. & K. 12 (Eng.).

made a profit, and then died with his will unchanged. It was held that the legacy of the long annuities was adeemed because the death of the testator left the estate without the specific thing he bequeathed as long annuities.

113. **Ademption of portions—Satisfaction by advancement.**—Suppose that a testator gives a certain bequest in his will, and afterwards and during his life, gives outright a sum of money or part of the bequest to that same beneficiary. What is the operation of such a subsequent gift inter vivos (during life) upon his right to receive the full amount of the bequest at the death of the testator? There are two rules governing the situation. One rule applies where the relationship between the testator and the beneficiary is that of parent and child, or foster parent and foster child, and the other where the relationship is more remote or even that of strangers. It appears that where the relationship is that of the former, it will be presumed that an advancement was intended and in such case when the beneficiary comes to claim his share at the death of the testator, there will be deducted therefrom the amount of what he received as a gift from the testator during the testator's life unless at the time of this gift inter vivos the testator expressed or evinced an intention that it was not to be an advancement.[47]

However, it seems that where the bequest is of a particular article or a particular thing, a gift during life of a different thing does not amount to an

[47] Izard v. Hurst, Freem. C. C. 224 (Eng.); Pym v. Lockyer, 5 Myl. & Cr. 29 (Eng.).

advancement and will not be deducted from the bequest at the death of the testator. The theory is that the gift inter vivos is a satisfaction in whole or in part, and not a substitution, of the bequest in the will, and unless it can be so considered it will not be deducted.[48] Money, as against securities, of course, can be so treated. Thus, ordinarily, where the will gave one piece of land, a gift of a different piece during life will not constitute a satisfaction as to the devise in the will, but if the gift inter vivos was a part of the piece given in the will, that will be held a satisfaction pro tanto (for so much).[49] But where the beneficiary's interest in the will arises from the residuary estate, a gift inter vivos is never considered as satisfaction of such interest in the residue, unless the testator clearly intends it to be.[50]

Where the relationship is more remote, however, or that of strangers, satisfaction is never presumed, but it must be clearly shown that a gift inter vivos was intended to be in satisfaction.[51] The reason for this is that in case of a child it is considered that the gift in the will is out of a sense of parental duty to give a portion and therefore a subsequent gift inter vivos is considered merely a present payment of the portion fixed by the parent in his will, as due that child.

114. **Ademption in case of special purpose.**—When a legacy is given for a special purpose, such

[48] Weston v. Johnson, 48 Ind. 1.
[49] Carmichael v. Lathrop, 108 Mich. 473.
[50] Same case as in note 49.
[51] Weston v. Johnson, 48 Ind. 1.

as to build a new church for a certain congregation, if the testator builds the church in his lifetime and then dies without changing his will, the legacy will be held to be adeemed and the congregation cannot collect upon the legacy after the testator's death. This rule is called ademption by fulfillment of a special purpose. [52]

[52] Taylor v. Tolen, 38 N. J. Eq. 91.

PART III

PROBATE OF WILLS AND ADMINISTRATION OF ESTATES

DIVISION I.

DECEDENTS' ESTATES

CHAPTER XII.

IN GENERAL.

115. **Probate.**—"Probate means the presenting of a will to a court for the purpose of having it approved and entered upon the records of the court. In the English ecclesiastical courts, which had exclusive jurisdiction of wills so far as they operated upon personal property, but no jurisdiction in respect to devises of real estate, there were two modes of obtaining probate, one in common form and the other in solemn form, or per testes. The probate was said to be in common form when the executor presented the will for probate in the absence of the parties and, without citing them, proceeded ex parte (without notice to possible contestants) with his proof; and it was said to be in solemn form when those in interest were cited to be present and full proof was made by the examination of witnesses. When a will was proved in common form, the court

might, at any time within 30 years after probate, of its own motion or at the instance of the next of kin or other person interested, require the executor to prove the will in solemn form.

"In the United States there is a general similarity of practice in administering the various statutory methods of probate and contest, but a considerable diversity in their technical features. In some of the states the proceeding in the probate court upon the original application for probate is entirely ex parte; but some proof of the will other than the oath of the executor, which was sufficient for the English probate in common form, is always required. In others, a notice and an opportunity for a contest are given, formal or informal, in the probate court. If the will is allowed or rejected without a contest, or after a contest not tried by jury, an appeal may usually be taken to an intermediate appellate court having a jury, where the case is tried de novo, and this remedy is sometimes exclusive. In others, after a decree of the probate court allowing the will, a retrial may be had upon petition to that court to revoke the probate, or an action at law or a suit in chancery to contest the validity of the probated will may be brought in another court within the county. These methods of contest by appeal, by petition to revoke the probate, or by original action correspond in purpose and effect to the probate in solemn form of the English ecclesiastical courts.

"In a great majority of the United States the probate court has exclusive jurisdiction to admit to probate wills containing devises of real estate, and

such wills are probated and contested in the same manner as wills of personalty alone."[53]

As to the effect of statutes of the type that provides that no will shall be effectual to pass either real or personal estate unless it shall have been duly proved and allowed in the probate court, it seems that a will still takes effect as of the date of the testator's death and that such a statute requires probate only as being necessary to prove title. Thus, where a trespass against property was committed before probate, a cause of action for the trespass arose at once, but the devisee could not sue upon it until after probate because he could not until then prove his title to the property.[54]

116. **When may a will be probated?**—A question might here arise as to when a will should be probated. Under the law, in the absence of a will, the heirs are entitled to the real estate and the next of kin to the personalty. Suppose that one dies and his heirs take possession of his real estate and sell to bona fide purchasers who pay value, all under the belief that there was no will. Long afterward a will is found and this will gives real estate to devisees other than the heirs. What are the rights of these devisees? Doubtless they have the right to have the will established in probate. Having accomplished this they cannot proceed against those who have purchased the land from the heirs in good faith believing that there was no will, but they may proceed against the heirs to recover the value of the

[53] 6 Ency. of Pl. and Pr. 993-996.

[54] Richards v. Pierce, 44 Mich. 444, LEADING ILLUSTRATIVE CASES.

lands from them, unless their right can be said to be outlawed by some Statute of Limitations.[55]

117. **Administration.**—Administration as a rule means the management and care of the personal property of one deceased. It has for its purpose the best conservation of the property for those entitled to it as beneficiaries, either the next of kin where the deceased died intestate, or the legatees, where the deceased left a will, and includes the collection of assets, the payment of debts and legacies, and distribution to the next of kin.[56] It is to be noted that in this article it is not confined to decedents' estates, but under the general subject of Administration, there is considered also the handling of minors' estates, and to that end, generally, the subject of Guardian and Ward in Division II, hereinafter. The first treatment, however, is of decedents' estates.

118. **Same subject—In general.**—When an individual dies intestate, that is, without a will, an administrator is appointed by a court, to administer what assets deceased left. Where the individual dies testate, i. e., with a will, two situations might arise: 1. The will may name somebody as executor to administer the assets; 2. The will may omit to name anybody as executor. In the former situation, the executor will perform the duties of an administrator. In the latter situation, of course, an administrator must be appointed, there being no executor, and he is called administrator with the will annexed.

[55] Haddock v. Boston & M. R. R. Co., 146 Mass. 155, 15 N. E. 495.
[56] 18 Cyc. 57.

Whether it be an executor as administrator, or an administrator with the will annexed, the rules governing their acts of administration are substantially the same. They are officers of the court and, as such, must follow the rules of court when acting in their capacities, and all their acts must be approved by the court. Their office is to represent the deceased, or rather his estate. As such representatives, their jurisdiction over the deceased's property extends only to personal estate and not to real estate, for at the death of the owner, intestate, only personal property belongs to the estate and real estate at once belongs to the heirs. Where the deceased leaves a will, this order of rights in the property he leaves is varied to suit the disposition provided in the will, and it is not uncommon for the testator to subject his real estate to payment of his debts. However, in absence of such provision, the general rule is that the personal property alone is answerable for the debts of the deceased. At common law, individuals could bind their real estate, even after death, by bonds executed during life, which bonds would be liabilities of the heirs to the extent that they inherited property from the decedents.[57] Statutes now, generally, contain provisions whereby, if the personal property proves insufficient to satisfy the deceased's debts, the real estate may be sold by petition to the court.

One distinction between the executor and the administrator is important to note, and that is the mode of appointment. The appointment of the for-

[57] Hays v. Jackson, 6 Mass. 149.

mer is simple, for he is pointed out by the will. He may decline the office, but if he accepts he is chargeable strictly with all the duties imposed upon the administrator. The appointment of an administrator is more or less difficult, for that depends strictly upon the statute governing it, and no little difficulty is sometimes encountered in determining who shall be the administrator.

In a number of states it is held that administration is unnecessary where there are no debts of the estate or the debts have all been paid and there are no minor heirs; the courts considering that when the only duty devolving on an administrator would be to make a distribution of the estate, and the heirs or distributees make or are able to make a satisfactory distribution or disposition thereof themselves, or there is only one heir, administration would be merely a useless ceremony involving unnecessary expense. And the same is true where no administration has been applied for and the claims of creditors, if any exist, are barred because they have not been presented to the probate court within the time limited for that purpose, or by the Statute of Limitations. But, if any of the heirs or distributees demand an administration, it must be had.[58]

[58] Brown v. Baxter, 77 Kansas 97, LEADING ILLUSTRATIVE CASES; Moore v. Brandenburg, 248 Ill. 232, 236.

CHAPTER XIII.

ADMINISTRATION.

119. **Jurisdiction.**—In order that the administration of an estate may go on, the proper court must acquire proper jurisdiction by proper proceedings. The court having jurisdiction of the estate of an intestate is usually the court which would have had jurisdiction if he had died testate, that is, the court of probate jurisdiction for the county or district in which the deceased was domiciled at the time of his death. If he had no fixed residence at the time of his death, then the court of the county in which he died may take jurisdiction, while if the intestate died abroad, the court of any county in which he had property may administer, though there cannot be more than one grant of administration in the same state. Of several courts in the same state which might acquire jurisdiction, that one will be allowed exclusive control which first acts in the matter.[59] But in order that any court may acquire jurisdiction of the estate of a non-resident decedent, he must have left property within its territory.

In general, in order that any court may acquire jurisdiction, it is essential that proof be made of the death of the alleged intestate. When a person has been absent from his established home, and unheard

[59] Ewing v. Mallison, 65 Kan. 484, 70 Pac. 369.

of by his friends and relatives for a period of seven years, it is presumed that he is dead, and the court may proceed upon that presumption. The same presumption may arise in less than seven years where the disappearance was accompanied by special circumstances, which of themselves raise a presumption of death.[60]

Where several lives were lost in the same disaster there is no presumption from age or sex that anyone survived the others, but the fact of survivorship must be proved by the party asserting it. The presumption of death in any of these cases is only a prima facie one, however, and may be rebutted by proof that the party is not dead.

If the supposed intestate is not in fact dead, the majority of cases hold that all proceedings to settle his estate are void, but a few states hold that the proceedings will be sustained so far as may be necessary to protect the rights of innocent parties. In some of the states the matter has been regulated by statutes. These statutes usually declare the proceedings void, but they also generally protect the rights of those who have acquired interests under the proceedings.[61]

The general rule is that there is no jurisdiction to probate a will or to grant administration unless the person is physically dead so far as can be ascertained. Therefore no jurisdiction exists where a person is civilly dead, as where he has been sentenced

[60] Rosenthal v. Mayhugh, 33 Ohio St. 155.

[61] Scott v. McNeal, 154 U. S. 34, LEADING ILLUSTRATIVE CASES; Thomas v. The People, 107 Ill. 517; Bolton v. Schriever, 18 L. R. A. 242, 135 N. Y. 65. See Day v. Floyd, 130 Mass. 488.

to imprisonment for life, though some statutes expressly provide for jurisdiction in just such cases.[62]

The proper court is usually set in motion by a petition from some person interested in the estate, setting forth the fact and nature of his interest; the fact of the death of the intestate; that he died intestate; that he left property within the jurisdiction of the court to be administered, stating its amount and the names and relationship of the persons who may be entitled to share in it. This petition is usually to be verified by the oath of the petitioner.

Upon filing the petition an order of hearing is made and a day set for such hearing, notice of which facts must be given to all parties interested, either by actual notice or by publication. Upon the hearing formal proofs of the allegations of the petition are made and then administration is granted.

A person not interested in the estate cannot set the court in motion by a petition for the appointment of an administrator.[63] But an interest as a creditor is sufficient. The statutes usually require that notice of the application shall be given to all parties who might be entitled to administer, and often to all who are beneficially interested in the estate. A failure to give the notice required by the statute will usually be sufficient cause for revoking letters of administration given without it. The persons cited to appear at the hearing, or any person

[62] In Re Zeph's Estate, 50 Hun 523 (N. Y.), LEADING ILLUSTRATIVE CASES.

[63] Johnson v. Johnson, 15 R. I. 109, 23 Atl. 106, LEADING ILLUSTRATIVE CASES.

beneficially interested in the estate, may appear and contest the grant of administration to any particular applicant.

The granting of administration is a proceeding in rem, the same as the probating of a will, to which there are no formal parties. And an order made by the proper court, upon such notice as the statutes require, is usually binding upon all the world.

Statutes in many of the states prescribe the time within which administration shall be applied for, and administration granted after such time is usually held void. In some states no limitation is prescribed and administration may be had within a reasonable time. In a few states the amount of property which shall justify administration is prescribed by statute, but in most states no such provision is found, though there must usually be some assets to justify the grant of administration. Often the sole asset is the statutory cause of action by the administrator for death of intestate through negligence of others.

120. **Who may claim appointment as administrator.**—At common law the surviving husband had the right to administer upon the estate of his deceased wife, and the surviving wife had, usually, the similar right, either alone or with the next of kin, to administer upon the estate of her deceased husband.[64]

This rule is preserved by the statutes in most of the states, and if there be no husband or wife surviving, then the right of administration usually passes to the next of kin. If no kindred exist com-

[64] Judge of Probate v. Chamberlain, 3 N. H. 129.

petent or willing to act, then a creditor or a stranger may be appointed.[65]

The right of the widow to administer the estate of her husband is not an absolute one, and may be forfeited by her misconduct. She is usually held disqualified where by an antenuptial settlement she has waived all rights in her husband's personal property. The right of the husband at common law might be lost for the same reason. And the right of either is dependent upon the existence of a valid marriage at the time of the death, so that if the marriage was void, or had been dissolved by divorce, the right of administering fails.

After the right of the surviving husband or wife to administer, usually comes the right of the next of kin. Who they are, and in what degree related, is to be determined by the rules already given in a previous chapter. Where there are several, standing in the same degree of relationship, the court usually has power to select the most suitable to administer. In making this selection, certain rules usually govern. Thus a sole administration is preferred to a joint one; males are preferred to females; residents to non-residents; unmarried women to married women; relatives of the whole blood to those of half blood; those more interested in the estate to those less interested, and the like.

After the next of kin, the creditors have usually the right to administer. In selecting an administrator from the creditors, the statutes often give those with the largest claims the preference, but some-

[65] Rev. Stats. of Ohio, § 6005.

times those first applying have the preference. In many of the states those having the right to administer, who do not desire to do so in person, may nominate the administrator.

The person entitled to be appointed administrator or executor may renounce the right, and then, in case of a sole executor, an administrator with the will annexed must be appointed, while in the case of an intestate estate, the right to administer passes to the person next entitled to it.

Contracts to renounce the right to appointment as administrator are usually regarded as opposed to public policy and void, though in a few cases such contracts have been sustained. Under most modern statutes, the emoluments of the office furnish meagre consideration for any contract.

121. **Qualification for the office of administrator or executor.**—The person entitled to administration being determined, and being ready and willing to accept the trust, he must qualify for the office. This qualification consists in taking the oath and giving the bond required by the statute, and in an amount fixed by the court according to the value of the estate to be administered. The form of the bond is usually prescribed by statute, but in substance it is conditioned upon the faithful discharge of the duties of the office according to law. The amount of the penalty of the bond is generally left to be fixed by the court, and is ordinarily fixed at double the amount of the personal property.

Sureties are required in such numbers as the statutes specify. In determining the sufficiency of the

execution and form of the bond, the courts give it a liberal construction for the protection of those in whose behalf it was required.

In many of the states an executor is not required to give a bond, if the terms of the will exempt him from the necessity. But in other states the statutory requirement of a bond cannot be thus waived.

If for any reason additional bonds, new sureties, or increased penalties, become necessary for protecting the estate while in the hands of the administrator or executor, the court is authorized to require them to be furnished. The office cannot be regarded as properly filled until the qualifying bond has been duly given, but a grant of administration without it would, ordinarily, be voidable only and not void.

122. **How the appointment is evidenced.**—Upon the due qualification of the officer, letters of administration will be granted to him, if an administrator; or letters testamentary, if an executor.

Such letters granted by a court having jurisdiction for that purpose are, while unrevoked, conclusive evidence of the authority of such officer, and cannot be collaterally impeached or attacked, though they may be revoked, by the proper court, in a direct proceeding for that purpose, or upon appeal from the order awarding them.

A grant by a court without jurisdiction is void, and confers no right upon anyone. Letters granted without authority may be recalled by the court.

The letters thus granted do not of themselves constitute the authority of the officer. They are the evidence of his authority, but not the only evidence.

As evidence of his appointment and rights as such, they are, when granted by a court of competent jurisdiction, conclusive. But they are not admissible as proof of the death of the intestate, in actions between strangers.

123. **What may be done by the officer before the letters are issued.**—It was the theory of the common law that the executor derived his authority from the will itself, and that his title, therefore, vested at the testator's death. An administrator, on the contrary, derived his title from the grant of administration. In most of the states the common law rule as to executors is repudiated and the executor, like the administrator, derives his title and power from the law or the grant of authority by the proper tribunal. But in either case, for the protection of property and the enforcement of rights, the appointment of the executor or administrator, when made, relates back to the time of the death of the testator. Before the grant of letters, the person nominated as executor, or the person entitled to administration, has no authority further than is necessary to preserve and protect the property until the appointment can be made. But if letters are subsequently granted to such person, acts done by him before the grant which would have been lawful had he then been the legal officer, will be deemed ratified.[66]

[66] Richards v. Pierce, 44 Mich. 444, 7 N. W. 54, LEADING LLUSTRATIVE CASES; Saxe v. Saxe, 119 Wis. 557, 97 N. W. 187. "An executor, according to the common law doctrine, derives his office solely from the will by which he is appointed, and not from the probate, which is held to be only evidence of his right. In many, if not all of the states of the Union the authority of an executor, while derived primarily from the will, is not derived solely therefrom, and is not complete until the executor has qualified by complying with

A person who, without authority, intermeddles with the estate of the decedent and assumes to act as executor or administrator, was, at common law, termed an executor "de son tort," that is, an executor "of his own wrong." Any act evincing a legal control over the goods of the estate would, if unexplained, make the person liable as such an executor. But mere acts of kindness or charity toward the property or estate of the decedent would not do so. An executor de son tort is said to have all the liabilities but none of the rights of a lawful representative. He is liable to be sued by the rightful representative, or by a creditor or a legatee; but he will usually be allowed credit for those acts which the lawful representative would have been obliged to perform.

If such an executor afterwards receives an official appointment, such of his acts as would have been valid, if he had been the rightful officer, will be ratified. The rules just mentioned relating to this class of executors have been abrogated by statute in many of the states, though in several states they still remain in force.

Suppose, now, that a will was admitted to probate and the executor named therein qualified, and one who owed money to the deceased paid his debt to the executor so qualifying; that subsequently the will was declared void. Would the man who had paid the executor under the void will be protected, or would

certain statutory requirements and has received letters testamentary from a court of competent jurisdiction; but the nomination in the will cannot be disregarded by the court unless the person named is for some reason disqualified to act as executor."

he have to pay again? The rule appears to be that he would be protected even though the will was forged. This is because such payment would be made to the executor as an officer of the court.[67] So also one who purchased property in good faith from executors who had qualified under a will duly admitted to probate which turned out to be spurious, obtained good title.[68]

Consider the obverse situation where administration has been granted by court and afterwards a will is found and offered for probate. Upon probate of the will an officer under the will, either the executor or an administrator with the will annexed (in case the will names no executor), would be appointed, and this would ipso facto revoke the administration granted before the existence of a will was discovered.[69]

124. **Removal of executor or administrator.**—The court has the power to remove an executor or administrator for cause, as where he is insane,[70] or because of some unfitness or unfaithfulness.[71] But such power of the court is never to be exercised merely for the convenience of the parties or because the beneficiaries may desire it. That is true particularly of executors whom the testator has appointed in his will, usually because of the testator's knowledge of their business capacity and his confidence in their integrity. When once they have accepted the

[67] Allen v. Dundas, 3 T. R. 125 (Eng.).
[68] Steele v. Renn, 50 Tex. 467.
[69] In Re Mears' Estate, 75 S. C. 482.
[70] In Re Shaw's Estate, (1905) P. D. 92 (Eng.).
[71] McIntyre v. Proctor, 145 N. C. 288, 59 S. E. 39, 13 L. R. A. (N. S.) 438.

trust (they are at liberty to decline), they are not afterwards permitted to resign and voluntarily put aside its responsibilities.[72]

125. **The rights, duties, and liabilities of executors and administrators.**—The first duty of the officer is to gather together and take into his possession such of the property of the deceased as passes to the representative. This property is termed the assets of the estate.

The real estate of the deceased passes usually to the heir or the devisee upon the death of the owner, and the personal representative has no interest in it. In a number of states, by statute, the representative is entitled to the possession of the real estate during the period of administration for the purpose of settling the estate, but even under these statutes the real estate is usually deemed to descend at once to the heir, who may exercise all the rights of ownership over it until the personal representative sees fit to exercise his possessory rights under the statute.

Except in such states as provide that the officer may possess himself of the real estate during administration, the personal representative is not bound or entitled to take possession of or to care for the real estate, unless it becomes necessary for the purpose of selling it to pay debts or legacies. If the personal estate is insufficient for this purpose, then the real estate becomes assets, by statute in all of the states.[73]

[72] McIntyre v. Proctor, 145 N. C. 288.

[73] Elstner v. Fife, 32 Ohio St. 358; Douglass' Lessee v. Massie, 16 Ohio 271; Ramsdall v. Craighill, 9 Ohio 198.

The testator may, by his will, confer upon the representative the power to sell, mortgage or otherwise deal with real estate, and powers so conferred are construed to be in addition to those conferred by the statutes.

Sales under such powers usually require no license or decree from the court. In all cases other than those in which such a power exists, the representative has no authority to sell the real estate, even for the payment of debts, without the order or license of the probate court. Where the testator confers a power to sell upon several, all of these persons must unite in its execution, and if one dies or refuses to do so, the power fails, though this latter rule is changed by statutes in some states.[74]

Discretionary powers conferred upon an executor by will, are usually personal in their nature and do not follow the office into the hands of his successor. That is, where A has been appointed executor by will with discretionary power nominated in the will, and he dies, his successor, B, will not have the powers which were conferred upon A.

Where such a power is conferred by the testator, and the object cannot be accomplished or is otherwise accomplished, the power ceases. If the testator directs the nature of the property to be changed, as to convert real property into personal property or vice versa, the courts of equity will regard that as done which is directed to be done, and the property so directed to be changed will be treated as though the change had actually taken place. This

[74] Rev. Stats. of Ohio, § 5980.

equitable rule is known as the doctrine of conversion, and applies wherever the testator has made a positive and unqualified direction to the executors or representatives to change property.[75]

Chattels real go to the personal representative after the death of the owner. By chattels real are meant interests in land less than freeholds, as estates for years, estates from year to year, and estates for the life of a third person (*pur autre vie*) continuing after the death of the testator.

The interest of a mortgagee in mortgaged real estate is personal property and goes to the representative.

If the representative buy the property so mortgaged, in a foreclosure suit on the mortgage, the property is still regarded as personalty and as an asset. The mortgaged property itself or the equity of redemption, prior to a foreclosure, is regarded as real estate, and on the death of the mortgagor goes to his heirs.

126. **Same subject—Personal property as assets.**—The chief portion of the deceased's estate, in fact, the sole portion over which the administrator or executor has the immediate control and of which he has the possession, is personal property. Real estate belongs to the heirs subject to the liability of being seized upon by the administrator under order of court and sold to pay debts where the personal property of deceased proves insufficient for

[75] Page, Wills (1st ed.), § 699; Ebey v. Adams, 135 Ill. 80, 10 L. R. A. 162; Johnson v. Conover, 54 N. J. Eq. 333; Collier v. Grimesey, 36 Ohio St. 17; Klotz's Est., 190 Pa. St. 152.

that purpose.[76] The decedent's estate consists of two kinds: 1. Goods and chattels, i. e., property actually in hand. 2. Rights in action, commonly called choses in action, such as debts.

127. **Same subject—Choses in action.**—Of the latter it is opportune to say a few words in this connection.

"The general rule of law is '*Actio personalis moritur cum persona*' (an action for personal injuries dies with the person), under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. But in that case the special damage ought to be stated on the record; otherwise the court cannot intend it. If this action be maintainable, then every action founded on an implied promise to a testator, where the damage subsists in the previous personal suffering of the testator, would be also maintainable by the executor or administrator. All injuries affecting the life or health of the deceased; all such as arise out of the unskillfulness of medical practitioners; the imprisonment of the party brought on by the negligence of his attorney; all these would be breaches of the implied promise by the persons employed to exhibit a proper portion of skill and attention. We are not aware, however, of any attempt on the part of an executor or administrator to maintain an action in

[76] People v. Brooks, 123 Ill. 246, 248.

any such case. Where the damage done to the personal estate can be stated on the record, that involves a different question. Although marriage may be regarded as a temporal advantage to the party so far as regards personal comfort, still it cannot be considered in this case as an increase of the individual transmissible personal estate, but would operate rather as an extinction of it; though that circumstance might have been compensated by other advantages. Loss of marriage may, under circumstances, occasion a strict pecuniary loss to a woman, but it does not necessarily do so; and unless it be expressly stated on the record by allegation the court cannot intend it. On the ground, therefore, that the present allegation imports only a personal injury, to which the administrator is not by law, nor is he in fact shown to be, privy, we are of opinion that, in the absence of any authorities, this administrator cannot maintain this action."[77]

Actions of contract for an injury to the estate never die with the testator. Anything that can be said to have come out of the corpus of the estate as distinguished from an injury to the body or person of the deceased, can be sued upon by the administrator. Thus where the deceased had been injured in a railroad accident and while laid up on account thereof incurred expenses for medical attention, the administrator could sue the R. R. Company and recover to this extent, and also for the injury sustained by the deceased's business because he was not able to attend to it while so laid up. But the

[77] Chamberlain v. Williamson, 2 M. & S. 408-414 (Eng.).

administrator could not recover damages for the deceased's pain and suffering as that had been strictly personal.[78] This has been changed by statute in many jurisdictions. So actions for fraud or deceit never survive, even though goods were sold to or bought from deceased by fraudulent representations, because the fraud was really an injury to the person.[79]

128. **Same subject—The inventory and appraisal.**—Having taken upon himself the administration of the estate, the officer is required by statute in all the states to make and file, within a time prescribed by law, a complete inventory of the estate, setting forth in detail all the property within his possession or knowledge and capable of recovery by him, which is, or may be, assets of the estate.

Assets coming to his knowledge or possession are subsequently to be added or included in the supplementary inventory. In most of the states, upon the completion of the inventory, the chattels described are required to be appraised by appraisers, usually three in number and appointed by the court, who are required to set down the true value of each article.

A failure to make or return the inventory as required by law, is a breach of the officer's bond, and the statutes usually provide summary remedies for securing a compliance with the law and for obtaining property concealed or withheld by the officer.

The inventory and appraisal are not conclusive

[78] Bradshaw v. Lancashire & Y. Ry., L. R. 10 C. P. 189 (Eng.), LEADING ILLUSTRATIVE CASES.

[79] Cutting v. Tower, 14 Gray 183 (Mass.).

either for or against the officer, but they are prima facie evidence of the amount of assets and of their value.

129. **Same subject—Concerning the collection and possession of assets.**—It is the right and duty of the officer to collect and take into his possession all the assets belonging to the estate which come to his knowledge, and his right during the settlement of the estate is superior to that of the heir or legatee.

He is bound to exercise good faith and reasonable prudence and diligence in commencing and prosecuting all actions which may be necessary to enable him to acquire possession of the property or to collect the debts due the decedent.

He is not bound to attempt the collection of bad debts, and he is not liable for their non-collection. But for debts or property lost by his negligence, he is liable.

Where the claim is a doubtful one, he may, and should, ask for indemnity or security from those urging its collection, but he must be prepared to show that it was not lost by his negligence.

The representative is not liable for a loss resulting from a mistake in law by which a debt remains uncollected, if he has acted in good faith and upon the advice of reputable counsel.

He is to use reasonable care and prudence in suing upon and enforcing those rights of action which survive to him and constitute part of the assets of the estate. And he must also prosecute or defend all actions commenced in the lifetime of the deceased

which survive, as well as seek to enforce those contracts and obligations which have been made with him since the death of the deceased.

In suing upon contracts made, or wrongs committed, during the lifetime of the deceased, the representative sues in his official capacity, but as to contracts made or wrongs done since the death of the deceased, he may usually sue either in his own name or in his official capacity, at his option.

To entitle the representative to sue upon the contracts of the deceased, it is not necessary that the contracts should refer to the representative, as the right will exist even though the contracts purport to be made with the deceased and his heirs or next of kin.

At common law, the representative might compromise or arbitrate a disputed claim or cause of action if he could show that his act was for the best interests of the estate. But if the arbitrators awarded less than might have been recovered by suit, or if he lost by such a compromise, the representative might be called upon to make up the loss. In most of the states, statutes exist by which the representative, with the consent of the court, may make a compromise without this personal liability.

In collecting the assets the representative has the right to enter upon the lands of the deceased to gather the crops or secure other personal property belonging to the assets of deceased.

As already shown, it was the rule at common law, that the executor or administrator could not sue upon strictly personal injuries that the deceased had

received in his lifetime, but any claim that arose out of an injury to the body of the estate as distinguished from an injury to the person of the deceased, the executor or administrator might sue upon. However, where a tenant made a covenant not to cut trees upon the premises, such a covenant, even if broken during the lifetime of the deceased, would not affect the personal estate but rather the real estate which went to the heir, so that the administrator would not be concerned.[80] A peculiar exception obtains in cases of fire insurance. The destruction of a building by fire directly affects part of the real estate, and therefore where the insured dies, the loss would logically be a loss to the heir and not to the administrator. However, it seems that contracts of fire insurance are looked upon as personal contracts of the insured, and on his death the executor or administrator may sue upon them. But he may not hold the recovered money as part of the estate and must surrender it to the heir.[81]

Suppose that the estate did not have sufficient assets to pay all its debts, so that creditors of the estate would receive only 50% of their claims, and that one of the creditors owed the estate money on another account. Could he set off against what he owed the estate, the full amount of his claim against the estate, or only 50%? The rule is that he might set off the full amount.[82] However, he may do this only where he himself is the creditor and he may not buy in claims of other people against the estate

[80] Raymond v. Fitch, 2 C. M. & R. 588 (Eng).
[81] Wyman v. Wyman, 26 N. Y. 253.
[82] Helms v. Harclerode, 65 Kan. 736.

for the purpose of setting them off against what he owes the estate.[83]

[83] Van Dusen v. Topeka Woolen Mill Co., 74 Kan. 437, 87 Pac. 74. In case of mortgages see Maitland, Equity and Forms of Action at Common Law. "Now the chief thing that we have to notice in this region is an old rule of equity about the rights of a creditor who has a security, but an insufficient security, for his debt. A. dies owing X. £2000, and his debt is secured by a mortgage of Blackacre. X. realizes his security. He sells Blackacre, but the sale produces only £1000. Well, of course, X. is still entitled to be paid another £1000, and if A.'s estate is sufficient for the payment of all his debts then X. will get that other £1000. But suppose that A.'s estate is insolvent; X. will certainly be entitled to something besides the £1000 that he got out of Blackacre. It would, I think, be natural to say that X.'s right is to prove against the testator's estate a debt of £1000, and take a dividend, whatever it may be, say five shillings in the pound, proportional to that debt of £1000; for £1000 is what is due to him after Blackacre has been sold. Now that was the rule to which the Court of Bankruptcy came in the administration of the insolvent estates of living persons. Its rule was this: The creditor with an insufficient security may do one of two things: He may abandon his security (abandon Blackacre) and prove for his whole debt (prove for £2000), or he may realize his security and prove for what still remains due to him after such realization. Thus in the case I have put he may pocket £1000, the price of Blackacre, and then claim a dividend on the other £1000 which still remains due to him. But the Court of Chancery in its administration of the estates of dead persons came to another rule, usually known as the rule in Mason v. Bogg (1837) 2 My. & Cr. 443. The mortgagee may realize his security, and may also prove against the general estate for the whole of his debt, provided always that he is not to get more than twenty shillings in the pound. Thus in our case X. might keep the £1000 that he gets from the sale of Blackacre, and then he may also prove against the general estate of the dead man for the whole £2000; but, of course, he is not to get in all more than the whole debt, the whole £2000 that is due to him. This rule may seem to you unjust, and it has seemed unjust to Parliament. It seems to favor the secured creditor unduly at the expense of unsecured creditors. However, you can see that there was a certain logic in it. The mortgagee has two distinct rights, the right in personam, the personal right against the debtor, and the real right, the right in Blackacre. Why should he not use both of these? Why should the fact that he has used one of them hamper him when he desires to make good the other? He sells Blackacre. Well and good; but the dead man owed him £2000. Why should he not prove against the dead man's estate for the whole of this debt? However, it is needless now to consider whether or no there was much justice in this reasoning; for a section of the judicature act of 1875—section 10—declared in effect that in the administration of the estates of dead persons the bankruptcy rule was to prevail as between the secured and the unsecured creditors."

130. **Same subject—Concerning the management of the estate.**—The statutes require that the officer, in dealing with the assets of the estate, shall act in good faith, and shall exercise that degree of care, skill and diligence which men ordinarily bestow in the management of their own affairs. If he fails in this respect and loss results by reason of his failure, he will be personally liable for the amount of the loss.

He should keep the property and funds of the estate separate from his own funds. If he deposits funds of the estate in a bank in his own name, he thereby becomes liable for their loss, by failure of the bank, even though the bank was in good credit at the time of the deposit and he had no funds of his own there, and the officers of the bank knew that the funds deposited were trust funds.

But if the officer acts with reasonable prudence and deposits funds in the name of the estate, or in his official capacity, he will not be liable if the bank where they are deposited fails.

The officer should not use the funds of the estate in his own business or speculate with them on his own account. If he does so, it is a breach of his trust and he will be liable for the loss of the money, if the investment fails, and must account for all profits if it is successful. He will also be held liable for the highest rate of interest on the money, and the persons entitled may, at their option, take such rate of interest or the profits of the private undertaking.

As a rule, the representative should not invest,

or permanently deposit, if he can use the funds of the estate in paying current expenses and demands; but when he cannot do so, it is generally his duty to invest the money in interest-bearing securities, and for failure to do so within a reasonable time, he may be charged with interest.

In some states, the statutes specify the investments in which such funds may be laid out, but in the absence of a statute, the officer will be bound to exercise good faith and sound discretion. He may usually secure from the court an order as to the investment, which, when followed, will protect him from personal liability.

The officer should use reasonable diligence and prudence in preserving and protecting the property of the estate, and should care for growing crops, live stock, and the like, and secure policies of insurance, and dispose of perishable property with reasonable diligence so as to prevent loss.

The representative is appointed to close up and not to continue the business of the deceased. He has, therefore, no general authority to continue the trade or business in which the deceased was engaged, and if he does so, will be liable for the losses incurred and must account for all the profits.

But a reasonable discretion will be allowed him in choosing the time, place and circumstances under which the business or trade shall be wound up, so as to enable him to dispose of it to advantage.

Also the testator may, by his will, direct the continuance of his business by the executor for a limited time, and in such cases, the executor will incur

no personal liability while acting within the authority so conferred upon him by the testator.

Where the business is continued at the request of those interested in the estate, they cannot complain of the acts of the representative, nor insist that he be charged with losses.

The same general rule applies to the settlement of the interest of the deceased in a partnership. Unless otherwise specified in the statute, the death of one partner dissolves the partnership and the surviving partner takes the entire legal title to the assets, for the purpose of winding up the business as soon as practicable. When the partnership affairs are wound up, the interests of the deceased partner are to be turned over to his representative. The representative has no right to continue the partnership business, unless such a power is conferred by the will or granted by the consent of the parties interested in the estate.

Undertakings by the deceased to perform purely personal services cannot be performed by the representative, but contracts of a general nature which are binding upon the deceased may be performed by the representative, if there is a reasonable prospect of profit, though at common law, the representative incurred the risk of being liable for the losses.

For any act of waste, mismanagement or breach of duty, by which the estate suffers loss, the representative becomes personally liable. Such losses or injuries to the estate by the representative are technically called "devastavit," that is, a waste committed by the representative.

The title to the personal property vests in the representative for the purpose of paying the debts and legacies charged upon the estate, and he may sell such property, when necessary, for that purpose. And unless restrained by the statutes, he may sell without the license of the court, subject only to his general obligation to act in good faith and with reasonable prudence.

The statutes in some states provide for the license, or order of sale, from the probate court. And in some of the states such license or order is indispensable. But they are usually held to be for the protection of the officer only, and he may sell without such license if he can realize a fair value, not less than the inventory value, though in case of a sale for less than the inventory value, such a license will protect the officer.

Unless provided otherwise by statute, the disposition of the property may be either at public or private sale, but the statutes providing for a license to sell usually require the court to fix the method, or provide only for a public sale.

So the authority of the officer to sell may be conferred or enlarged by the will, and such sales authorized by the will usually require no license. The power to sell includes the power to sell and assign negotiable securities, also chattels real. And unless restrained by the statute the officer may pledge or mortgage the personal property to procure the necessary funds to manage the estate.

A third person buying of the officer is not bound to see that such officer properly applies or accounts

for the proceeds derived from the sale; nor will such person's title be affected by the fraud of the officer, if he himself acts in good faith with reasonable prudence and parts with value. But if such third person colludes with the officer, or has reason to believe that the officer is acting wrongfully, he cannot acquire a valid title. The officer has no right to give away the assets of the estate and the person receiving such a gift is bound to know this fact.

The officer as such has no power to bind the estate by contract, and his attempt at such a contract will bind himself only, or no one. The fact that he added the word "executor" or "administrator" to his written promise, or made the contract as such officer, will not relieve him. He can only relieve himself from personal responsibility by limiting his promise to the assets of the estate.

A judgment or decree against him in his official capacity upon a demand created by him during the settlement of the estate binds him personally. But the estate alone is bound on a cause of action created by the deceased.

In the absence of a statute authorizing it, the officer has no power to sell or mortgage the real estate. But in nearly all of the states such a power is conferred by statute for the purpose of paying the debts, and often for the purpose of paying legacies.

These statutes provide that in case of a deficiency of personal property the court may authorize the sale or mortgage of so much of the real estate as may be necessary to make up for the deficiency. Such statutes usually require, first, a petition showing

the necessity; second, a special bond from the officer to cover the proceeds of the sale; third, a formal sale, usually a public one; fourth, the execution of a proper deed under the direction of the court, and fifth, a proper disposition of the money derived from such sale.

The jurisdiction to order the sale of real estate is purely statutory, and in order that valid title may pass it is essential that the court shall have acquired jurisdiction and that all the requisites of the statute shall be substantially complied with. But there are many irregularities which will suffice to set aside such a sale if raised by appeal or a direct proceeding for that purpose, which will not suffice if the sale is attacked collaterally. The majority of the courts in this country hold that if the court had jurisdiction and notice was given to parties interested, the proceedings cannot be attacked collaterally for irregularities or for a failure to observe those requirements which were evidently not designed for the essential protection of the parties in interest.

In a few states where probate courts are held to be courts of inferior and limited jurisdiction, it is held that every fact prescribed by the statute to authorize the order of sale must affirmatively appear.

The period within which such order may be granted is usually fixed by statute; where no statute exists the application must be made within a reasonable time, and at all events before the Statute of Limitations has operated.

The officer will not be permitted directly or indi-

rectly to buy at his own sale, and if he does, the sale may be set aside.[84]

The rights of creditors take precedence over those of devisees and legatees, and therefore all of the real estate, whether devised or not, may be sold under these statutes to pay debts. But legacies have necessarily no priority over devises, and lands devised will not be sold to pay legacies, except where the devise is of the residue after the payment of debts and legacies, or where the land is charged with the payment of legacies. In fact, personal property goes before real estate, and general legacies and devises before specific ones.

131. **Same subject—Concerning the liability of the officer.**—The liability of the officer, as such, may arise (a) from the acts of the deceased, or (b) from his own acts.

(a) *Extent of liability for acts of deceased.* To the extent of the assets the officer is liable for all the debts and contracts of the decedent upon which actions were or might have been brought in his lifetime, excepting only those contracts founded upon purely personal considerations.

The same rules govern the survival of actions against the representative, which govern the survival of actions in his favor. The liability of the officer extends only to the valid contracts and debts of the deceased, and the representative has no authority to make contracts for him or to ratify his invalid transactions.

Actions of tort against the deceased, like those in

[84] Rittenhouse v. Smith, 255 Ill. 493, 496.

his favor, die with him, at common law. But the same statutes which make them survive in his favor, usually make them survive against him.

Where two or more are jointly indebted and one dies, the action at common law is to be brought against the survivor or survivors only. If the action is on a joint obligation, and one of the plaintiffs dies, the action proceeds by the survivor only. But if the action is upon an obligation which was joint and several, the representative of the deceased party may be brought in.

The representative is bound upon those covenants of the deceased concerning real estate which were not personal to himself or terminated by his death. Thus, to the extent of the assets, the representative is bound by the covenants of the deceased in a lease or deed, and by his agreements to buy or sell land, and this whether the breach occurred before or after the death of the covenantor. But on covenants implied by law the representative is not bound unless the breach occurred during the life of the deceased.[85]

It is to be observed that where an executor or administrator is authorized to enter into a deed or instrument of sale or conveyance, he is never authorized to bind the estate by any warranties or covenants of quality, value or title.[86]

(b) *Officer's liability for his own acts.* The officer is personally liable for those acts either of active wrongdoing or of negligence by which the

[85] Appeal of Quain, 22 Pa. 510.
[86] Bauerle v. Long, 187 Ill. 475, 58 N. E. 458, 52 L. R. A. 643.

estate suffers loss. He is usually held personally liable upon all causes of action which have arisen since the death of the deceased. When sued for causes of action arising in the lifetime of the deceased the action is against him in his official capacity, while upon causes of action arising since the death of deceased, he is sued as an individual, except that upon contracts relating to the estate, he may be sued either as an individual or in his representative capacity, if the consideration or cause of the action arose in the lifetime of the deceased.[87]

132. **Same subject—Concerning the payment of debts and legacies.**—It is the primary duty of the officer to pay, out of the assets, the legal charges against the estate. Before the claims of the general creditors can be considered there are usually three classes of claims given precedence by statute; these are: (1) Expenses of administration. (2) Funeral expenses. (3) The allowance made for the support of the widow and minor children of the decedent.

It is the duty of the officer, if there are assets, to bury the deceased in a manner conforming to his position, and the expense incurred is properly chargeable as an expense of administration. In some states such expenses are classed with the general debts, though often given precedence, and in such cases would yield priority to the other expenses of administration.[88]

If the assets exceed the amount required for the payment of the expenses of administration, then the debts of the deceased are to be paid. As to these

[87] Luscomb v. Ballard, 5 Gray 403 (Mass.).

[88] Id.

the statutes in the various states establish different orders of priority. Usually, the funeral expenses come first, and with them, frequently, the expenses of the last sickness; then debts due the government, as public rates and taxes; next judgments and debts due upon specialties, and in some states, the debts due to laborers and for rent; and finally the general debts of the deceased due to all other persons.[89]

In case of a deficiency of assets the officer will render himself personally liable by paying debts of inferior rank without reserving enough to pay those of a superior rank. And in case of a deficiency of assets, all debts of the same rank share ratably, that is, they are abated ratably.[90]

Public notice is required to be given by the administrator or executor, so that creditors may present their claims for allowance and payment, and the statutes prescribe a time within which claims must be presented or they will be disregarded.

In some of the states claims are to be presented to the representative, but in most of the states provision is made by statute for presentation to, and allowance by, some tribunal, appointed by the court, or else the court itself. In most cases they are

[89] Rev. Stats. of Ohio, § 6090. McClellan v. Filson, 44 Ohio St. 184; 8 Am. & Eng. Encyc. of Law (2d ed.), p. 1034. "At common law the personal representative was required to pay the claims against the estate of the decedent in the following order: (1) The necessary funeral expenses, the extent of which was fixed by the condition and rank of decedent; (2) necessary expenses of the administration; (3) debts of record due to the crown; (4) debts of record due to subjects, which included judgments, decrees, statutes, and recognizances; (5) debts by specialty, founded upon a valuable consideration, and debts for rent; (6) simple contract debts, based upon valuable consideration; (7) voluntary bonds or covenants; (8) other voluntary debts."

[90] Norman v. Baldry, 6 Sim. 621 (Eng.).

to be verified by the oath of the claimant or established by legal evidence.

As a statutory rule no action can be brought against the representative, or levy upon the assets made, during the time allowed by law for the payment of all claims, upon any claim required to be presented for allowance. The rule requiring presentation does not usually apply to those unliquidated claims which can only be determined by an action at law. A judgment can be presented for allowance.

It is the duty of the representative to interpose all defenses which the deceased might have made in his lifetime as well as those arising since his death, and to take advantage of all set-offs and counterclaims which are available. The officer will not be allowed to waive the benefit of the Statute of Limitations, or to ratify dealings which are invalid under the Statute of Frauds, or to waive the special statutes providing for presentation and allowance of claims within a specified time.

The statutes usually make provision for the allowance of contingent claims, subject to the contingency, and for allowing claims not yet due.[91] Either party, if grieved by the allowance or rejection of a claim, may appeal either to a higher court, or, in states where claims are not judicially passed upon, to the courts of law.

The claims having been finally passed upon, it is the duty of the representative to lay before the court a statement of the amount and nature of the

[91] 2 Woerner, Amer. Law of Adm. (2d ed.), § 394; 58 L. R. A. 82, note.

claims and the character of the assets available for their payment. If necessary, application for licenses for leave to sell personal or real property are then made, and sales are had, and when the assets are finally in a distributable form, an order or decree is made, determining the order or priority of payment, the amount of the dividend, where all claims cannot be paid in full, and decreeing payment in the manner so determined. The payment of the debts according to this decree may be enforced by action, and in many states by a statutory remedy, against the representative and his sureties.

Before the representative can safely pay over legacies, whether general or specific, he must see that the debts are paid. If there are contingent claims outstanding, or if legacies are made payable before the time allowed for the presentation of claims has expired, the representative is entitled to indemnity from the legatees before paying them. Unless otherwise provided by statute, legacies are deemed payable within one year from the testator's death, though the right to the legacy is deemed to vest at the testator's death. The income and profits on specific legacies accruing since the death of the testator pass with the legacies, but interest on general legacies is not allowed until after they are payable.

Specific things bequeathed are to be identified and delivered to the legatee, and general legacies are to be paid in money. The legatee has no right to take possession of his legacy until the representative consents, although if he unreasonably withholds his consent it may be compelled in equity.

Assent to a specific legacy vests the title in the legatee and is irrevocable. But if, after the delivery or payment of legacies, unexpected claims arise, equity will compel the legatees to refund.

Where a specific legacy is appropriated to the payment of debts or other legal charges against the estate, the legatee, in case the general or residuary legacies are not sufficient, is entitled to contribution from the holders of other specific legacies. The order of contribution is as follows: 1. Personal property undisposed of. 2. General residuary legacies. 3. General legacies. 4. Specific legacies.

Where lands specifically devised are taken to pay debts, the devisee is entitled to indemnity from any other class of property which should have been first taken; if there be none such, then to contribution from other devisees whose gifts are equally liable to be called on for the payment of debts. The testator may, by his will, determine the order in which his property shall be applied to the payment of debts, as by charging them in whole or in part on the realty, or upon the personal property; and the same end may be accomplished by his directing that certain of his property shall be exonerated from the payment of debts, thus charging the debts on the other classes of property.

In appropriating the assets to the payment of debts the following order is, in general, to be observed:[92]

[92] In Ohio, after the personal property and undevised realty are disposed of, all devises and legacies must contribute pro rata to the payment of debts. Rev. Stats. of Ohio, §§ 5972-5973.

(1) The general personal estate, unless expressly or impliedly exonerated.

(2) Lands expressly devised to pay debts.

(3) Estates which descend to the heir.

(4) Real or personal estate devised or bequeathed, charged with debts.

(5) General pecuniary legacies pro rata.

(6) Specific legacies and devices pro rata, whether in terms specific or residuary.

(7) Real or personal property of the testator appointed by the testator under a general power.

Debts and legacies will be deemed charged upon the land not only when the will expressly so declares, but also where such an intention is fairly to be inferred from the language used. Where there is sufficient personal property to pay the debts and the land is taken, the heir or devisee may have reimbursement out of the personalty. And where the debts are charged upon the land and the personal property is taken, the land will be compelled to reimburse the personal estate.

Where there are two claimants, one of whom has access to two funds while the other has access to but one of these funds, the assets will be marshalled so as to compel the first claimant to exhaust the separate fund first.

133. **Co-executors and co-administrators.** — The administration of the estate of a decedent may be entrusted to two or more administrators. In such a case the authority and interest of all are joint and entire, and they are looked upon in law as one person. Upon the death of one the entire authority

vests in the survivor. Each is entitled to the possession of the assets, and the possession of one is the possession of all. As respects the personal estate one may do what all may do, and the act of one within the scope of his authority is the act of all. The same good faith and prudence is required of each which would be required if there were but one.[93]

It seems, however, that a payment made by one against the objection of his co-executor upon a claim that was barred by the Statute of Limitations in the lifetime of the testator, does not revive the claim.[94]

In general, each one is liable for his own defaults only, and for the assets so far as they come into his hands. But one will be liable for the acts and defaults of another where he gives a joint bond with him, or joins in the act, or reduces the assets to the sole possession of his associate, or is guilty of negligence in permitting the default of the other, or in any way directly contributes to the default.

Breaches of duty by one may be restrained in equity, at the suit of the other, or the guilty one may be removed by the probate court. All should join in bringing actions on behalf of the estate, and should ordinarily be sued together, though one may sue or be sued alone on contracts made by him on his own account, or for goods taken out of his possession. One joint administrator cannot sue the other, or the estate, on matters connected with their administration.

A person cannot be forced into a joint administra-

[93] Cross v. Long, 66 Kan. 293, 71 Pac. 524.
[94] Haskell v. Manson, 200 Mass. 599.

tion against his will, but an agreement between two such joint officers, that one alone shall manage the joint estate, is void. A principal, and an ancillary administrator are not co-representatives within the meaning of these rules.

134. **Foreign representatives.**—A personal representative appointed in one state has no legal authority in another state, and cannot there sue or be sued in his official capacity. Statutes exist in many states by which a representative from another state may be appointed if no local administration has been already granted, and in a few states the foreign representative is recognized without appointment.

Administration must therefore, usually, be taken out in each state in which there are assets, but after the satisfaction, in whole or pro rata, of the local creditors, the residue of the assets will usually be transmitted to the principal jurisdiction. The amount to be allowed to the local creditors is usually determined by the proportion which the assets in all jurisdictions bear to the debts in all jurisdictions, though in some states local creditors are required to be paid in full out of local assets.

Though the foreign representative cannot sue, it is held that his assignee may; and it is also held that the voluntary payment or delivery of assets to the foreign principal representative, before a local one is appointed, will protect the party so paying.

Upon all obligations which may be enforced by or against the representative in his personal capacity, actions may be brought by or against him

in a foreign state. The allowance of a claim in one jurisdiction is held not to be conclusive on assets in another, but such claim must be presented anew where the assets exist.

135. **Administrator with the will annexed.**—The powers and duties of an administrator with the will annexed are substantially those of an executor, except that special commissions, trusts, or powers conferred by the will upon the original executor, which imply a personal confidence in the executor named, will not pass to the administrator with the will annexed.

136. **Administrator de bonis non.**—The administrator de bonis non, as the name implies, is appointed to complete the work of a former administrator. Such an officer, whether appointed in a testate or intestate estate, has all the rights and powers and is subject to all the responsibilities of an original representative so far as the estate is left unadministered. He may recover all assets from his predecessor or third persons, and may bring all actions necessary for that purpose, and is not estopped by the illegal acts of his predecessor.

Whatever his predecessor rightfully did is binding upon the administrator de bonis non, but wrongful or improper actions are not binding. The successor to an administrator is bound upon contracts of his predecessor, and may avail himself of those which are assets of the estate. He is not liable for the defaults of his predecessor, but is bound to exercise the same good faith, prudence and diligence which are required of any representative.

137. **The accounting and discharge of the administrator.**—The representative is bound to keep full and accurate accounts of his official transactions, and is usually required to render an account to the probate court at stated intervals,—frequently at the close of each year.

Upon the expiration of his trust, either by full performance, or by resignation or removal, it is his duty to render a final account. Before the final account will be allowed, notice is required to be given to parties interested in the estate that they may appear and dispute its correctness if they desire. The officer is to charge himself with all assets which have come into his possession, whether inventoried or not, and with all income, increase and profit, arising spontaneously or as a result of his good management or effort. He is to be charged also with all assets or profits which have been lost by his misconduct or negligence.

He is to be credited with all his lawful distributions and payments, with the necessary expenses and disbursements for the estate, and with his proper compensation.

At common law the officer was not entitled to compensation, but by statute in most of the states a rate of compensation is fixed, and the probate court has usually the power to, and will allow him extra compensation for extra or unusual services.[95]

Upon the final allowance of his accounts by the probate court the officer is entitled to be discharged from his trust and to have his bond cancelled. Ap-

[95] Arnold v. Alden, 173 Ill. 229; Colton v. Field, 28 Ill. App. 354.

peals may be taken from orders allowing or disallowing his accounts, but unless thus appealed from, the decree allowing his final account and discharging the officer is to be regarded as conclusive, and generally such decree cannot elsewhere be called in question.

With the final allowance of his accounts and the discharge of the officer, upon a full administration of the estate, the settlement of the estate is ended.

DIVISION II

GUARDIAN AND WARD

CHAPTER XIV.

DEFINITIONS AND GENERAL PRINCIPLES.

138. **Persons in loco parentis.**—Sometimes it is necessary for the law to accept or designate a person to act for or in place of a parent, in the care, custody and control of infants, or of persons incapacitated to care for themselves. Such persons, as regards their general rights and duties, are said to be in loco parentis, that is, parents for the time being. Thus the relation of guardian and ward, Blackstone observes, bears a near resemblance to that of parent and child, and is plainly derived from it; the guardian being only a temporary parent, that is, for so long a time as the ward is an infant, or under age.[96] So the instructor or teacher who has the care of the minor's education and instruction, is said to stand in loco parentis, and to have the power to restrain and correct the pupil to the extent that may be necessary to answer the purpose for which he is employed.[97]

139. **Guardianship defined.**—Guardianship arises when one person is entrusted by law with the interests of another, who from youth, inexperience,

[96] 1 Blackstone, Commentaries, p. 460.
[97] 1 Blackstone, Commentaries, p. 453.

mental weakness or other cause is disqualified from acting for himself. The person so entrusted is called the "guardian," and the individual whose person or property is entrusted to the guardian is called the "ward." The relationship is governed by judicial regulation, and is properly embraced by the term, administration of minor's estates.

140. **Guardianship at common law.**—At common law there were a variety of guardianships which are now obsolete, or are replaced by statutory enactments, or changed by the form of our institutions.[98] Blackstone mentions three species of guardians recognized by the common law, as, guardians by nature, guardians for nurture, and guardians in socage.[99] The parents were the natural guardians; first the father and then the mother. The parents were also the guardians for nurture, and this applied to the children who by the English law were not to be heirs; it continued until the child reached the age of fourteen. If there were no parents, a discreet person was assigned to maintain and educate the infant.[1] Guardianship in socage arose where the minor was entitled to an estate in lands, and the policy of the common law demanded that the guardianship should be entrusted to the next of kin incapable of inheriting from the ward, to remove the temptation for the guardian to abuse the trust. The guardian in socage retained possession of the ward's

[98] 2 Kent, Commentaries, p. 221.

[99] 1 Blackstone, Commentaries, p. 461; In Re Galleher, 8 Cal. App. 364, 84 P. 352.

[1] Holmes v. Derrig, 127 Ia. 625, 103 N. W. 973. On the death of the parents, the grandfather or grandmother succeeds to the guardianship.

property until he attained the age of fourteen, when he could choose his own guardian.

By 12 Car. II, chap. 24, the father might appoint a testamentary guardian for the person and property of his minor children until they attain the age of twenty-one.[2]

The lord chancellor as the delegated agent of the king was recognized as the general and supreme guardian of all infants, as well as of idiots and lunatics. Guardians might act on the advice and direction of the chancellor in dealing with their wards' estates, and were responsible to the court of chancery for any abuse of their trust, and might be removed by such court.[3]

141. **Guardianship in the United States.**—The common law relating to guardianship has been largely replaced by legislation in the various states of the Union, and the whole subject is controlled in a great measure by local statutes. There are fewer kinds of guardians, and outside of guardianship by nature, or the right of parents, when not unfit, to custody of the child's person, the common law has been entirely superseded. We have testamentary guardians, and chancery or probate guardians, but the distinction lies in the method of appointment and not otherwise. There is a distinction between the various courts known as probate, orphans', ordinary's and surrogate's, and the chancery courts. While the former have been vested with jurisdiction to appoint guardians, and to exercise a control

[2] 1 Blackstone, Commentaries, p. 462.
[3] 1 Blackstone, Commentaries, p. 463.

over them similar to that exercised by the court of chancery in England, and sometimes to the exclusion of the chancery courts, yet unless the terms are exclusive the court of chancery still retains its general supervision.[4]

142. **Same subject—The parents as natural guardians.**—Quite generally the father, and on his death the mother, is regarded as the natural guardian of the person of the ward, but neither parent is recognized as the guardian of the property coming to the child by gift, devise, etc., unless so appointed by a court of competent jurisdiction.[5]

143. **Appointment of guardians.**—Guardians derive their authority either from the law, as in the case of natural guardians, or from a special appointment. The special appointment may be by the parent, by the infant himself, or by a competent court.[6]

The legal right of the parents to the custody of minor children has already been treated in "Law of Persons and Domestic Relations." But at the death of the parents the next of kin do not succeed to their right of natural guardianship. The mother of a bastard child is its natural guardian and not the putative father.[7]

144. **Same subject—Appointment by the parent.**—Whether testamentary guardianship was recog-

[4] Matter of Andrews, 1 Johns. Ch. 99 (N. Y.), LEADING ILLUSTRATIVE CASES.

[5] In the matter of Roberts, 3 Johns. Ch. 43 (N. Y.); Schouler, Dom. Rel., § 298; Power v. Harlow, 57 Mich. 107, 23 N. W. 606.

[6] In Re Brady, 10 Ida. 366, 79 P. 75.

[7] Wright v. Wright, 2 Mass. 109; 2 Kent, Commentaries, p. 223.

nized under the old common law is questionable. However, the English statute of 12 Car. II expressly conferred this right upon the father and this has been generally adopted in this country. This power thus conferred, when exercised to its full extent, invested the testamentary guardian with an authority over the children almost as extensive as that of the father himself. The statute, and the state statutes following it, entirely ignored the rights of the mother, and in states where the law has not been subsequently changed, she has no right to appoint a testamentary guardian for her children, even though the father is dead.[8] This exclusive power of the father to appoint the testamentary guardian has now, in most states, been abrogated by statute, so as to allow the same right to the mother after the father's death.[9]

Usually, before confirming such an appointment, the court requires that sureties be furnished, unless there is exemption by the appointment. A parol appointment is insufficient.

A testator cannot appoint a testamentary guardian except to his own children; but an attempt to appoint one for others may create a trust.[10] A firm cannot be made a testamentary guardian, nor could a corporation formerly, but certain financial corporations are now chartered with power to assume fiduciary trusts.[11]

[8] 2 L. R. A. (N. S.) 203, note; Hernandez v. Thomas, 50 Fla. 522, 39 So. 641.

[9] Kellogg v. Burdick, 96 N. Y. S. 965, 110 App. Div. 472; Wadsworth v. Connell, 104 Ill. 369.

[10] Camp v. Pittman, 90 N. C. 615.

[11] Rice's Case, 42 Mich. 528; Schoul. Dom. Rel. (5th ed.), § 301.

145. **Same subject—Appointment by the court.** —The appointment of a guardian solely by the infant himself, as at common law when the infant at fourteen could supersede a guardian in socage by one of his own choosing, is not now permitted. Infants have still the privilege of selecting a guardian when of this age, but the person selected must be authorized and appointed by the proper court. This is a matter of statute, and the privilege is not uniform.[12]

If the infant is not of age to select, and no person has been appointed by the will of the parent, the court will appoint a fit person. The court is governed in its appointment by the statutes. The usual procedure is for a relative or someone interested in the appointment to petition the probate court, setting forth the facts in the case and asking the appointment of a guardian. Where the child is over fourteen years of age it may assent to the petition, and the parent or next of kin also join in the petition. But if the interested persons do not thus assent, the person petitioning must give notice to them that they may appear in court, show that the infant's interests demand the appointment of a guardian, and ask that a suitable person be selected.[13]

Before the letters of guardianship are issued the court requires the filing of a bond by the guardian to account for the property of the ward; this bond is made to correspond to the amount of the ward's

[12] Ham v. Ham, 15 Gratt. 74 (Va.); Dibble v. Dibble, 8 Ind. 307; Rev. Stats. of Ohio, § 6257.

[13] Taff v. Hosmer, 14 Mich. 249, LEADING ILLUSTRATIVE CASES.

personal and real property of which the guardian will have the control.[14]

146. **The court appointing.**—As has been seen, the chancery courts have been superseded in this country by the special county courts, as probate, orphans', surrogate, etc., which usually issue the letters of guardianship under their official seal. In some states the chancery and county courts exercise concurrent jurisdiction.[15]

The court in the county of the ward's domicile has jurisdiction to appoint, and if the ward is a non-resident, the court of the county in which he has property. If the property is in two or more counties, the court in which the application is first made takes and retains jurisdiction.[16]

147. **Who should be appointed guardian.**—The court appointing has the widest discretion to appoint a guardian for the best interests of the child, preference being given a surviving parent, or a relative, and the court will be guided but not controlled by the wishes of the parent.[17] The leading consideration for the court should be the interest and welfare of the child, and this, which has become the only rule of choice as between distant kindred, may control even the selection of the father himself.[18] But local statutes may and do specify

[14] Rev. Stats. of Ohio, § 6259.

[15] Schouler, Domestic Relations, § 303; Kelsey v. Green, 69 Conn. 291, 37 Atl. 679.

[16] In re Danneker's Guardianship, 67 Cal. 643, LEADING ILLUSTRATIVE CASES, and Rice's Case, 42 Mich. 528.

[17] Heinemann's Appeal, 96 Pa. St. 112; Wardwell v. Wardwell, 91 Mass. 518; Schouler, Domestic Relations, §§ 304, 305.

[18] Badenhoof v. Johnson, 11 Nev. 87.

to what extent the surviving parent and next of kin are entitled to preference.[19]

The father's informal testamentary appointment or his deathbed wishes may control the court; also that of the mother in states which recognize her right of choice.[20]

148. **Rights and duties of guardian.**—Subject to the regulation of the court, a guardian of the person of a ward is entitled to the custody of his ward not only as against the wishes of near relatives, but also as against the wishes of a parent.[21] The rights of a guardian may be restrained by an order of court to conform to the best interests of the child.

The guardian may change the domicile of the ward, within the state, but a prejudicial removal of the ward from the state may be restrained.[22] The parent as guardian has more authority to change the domicile. The guardian may select the place of the ward's education, and may protect him from improper associates.[23] The guardian has no right to the ward's services, and cannot maintain an action for the seduction of a female ward.[24]

149. **Same subject—Duties as to ward's person.**—The guardian's duties are those of the parent: protection, education, and maintenance. But his duties differ in that he is bound to maintain the ward

[19] Weldon v. Keen, 37 N. J. Eq. 251.

[20] Schouler, Domestic Relations, § 305; Matter of De Marcellin, 31 N. Y. Supr. 207.

[21] Senseman's Appeal, 21 Pa. St. 331.

[22] 2 Kent Com. 227; Wilcox v. Wilcox, 14 N. Y. 575.

[23] Wood v. Gale, 10 N. H. 247.

[24] Blanchard v. Ilsley, 120 Mass. 187; but see subject, DOMESTIC RELATIONS.

only to the extent of the ward's own estate. If there is no estate the ward must be put to work, or if too young, may be entrusted to a charitable institution.[25] The guardian may bind himself for the ward's maintenance if he fails to limit the liability to the property in his hands.[26] The father as guardian cannot use the child's income or principal, save by authority of court, as ordinarily it is his duty as parent to support the child.

150. **Same subject—As to ward's property.**—The guardian's trust is one of obligation and duty, and not of speculation and profit.[27] The guardian obligates himself to conform to the power of his appointment, and carry out the duties he assumes with the same prudence, care and diligence which a good business man would use in the management of his own property. The ward's interest being the constant consideration of the chancery court, it is held that unauthorized acts of the guardian may be sanctioned if they redound to the ward's benefit; but for unauthorized acts which cause a loss, the guardian is amenable.[28]

As a general rule the guardian can expend no more than the income of his ward's estate without the sanction of the court.[29] The order in which the ward's property is to be applied to his maintenance is, first, the interest or income, next, the personalty, and, last, if necessary, the real estate. But the real

[25] Browne, Domestic Relations, 95.
[26] Hutchinson v. Hutchinson, 19 Vt. 437.
[27] 2 Kent Com. 229.
[28] Schouler, Domestic Relations, § 341.
[29] State v. Clark, 16 Ind. 97, LEADING ILLUSTRATIVE CASES.

property is never to be sold unless necessary for maintenance, and then only by the order of the court.[30] The guardian is allowed a liberal discretion in expenditures for the ward's maintenance and education, if he does not intrench upon the ward's capital.[31]

The guardian may render himself liable by acts of negligence in dealing with the ward's property, and the proper way in case of doubt is for him to seek the advice of the court and be governed by it.[32] He should not mingle his ward's money with his own or use it in his own profit.[33] The guardian cannot make profit by buying the property of the ward, nor by selling his property to the ward.[34]

Within a reasonable time after his appointment the guardian should set aside a reasonable sum for his ward's current expenses, and the balance he should safely invest for the benefit of the ward. He cannot long suffer his ward's money to be unproductive, and if he does he becomes chargeable with interest.[35] And for fraud or positive misconduct in the management of the ward's money he may be chargeable with compound interest.[36]

In some states it is provided by statute in what securities the guardian may invest his ward's funds; but in general all public securities, like state or national bonds, are to be preferred, and real estate

[30] Strong v. Moe, 8 Allen 125 (Mass.).
[31] Karney v. Vale, 56 Ind. 542; Chubb v. Bradley, 58 Mich. 268.
[32] Lamar v. Micou, 112 U. S. 452.
[33] State v. Sanders, 62 Ind. 562.
[34] Lane v. Taylor, 40 Ind. 495; Bostwick v. Atkins, 3 N. Y. 53.
[35] McKim v. Morse, 130 Mass. 439.
[36] Stark v. Gamble, 43 N. H. 465; Rev. Stats. of Ohio, § 6269.

security is preferred to investment in railroad stock.[37] Small sums of money may be deposited in a savings bank. In case of doubt as to proper securities the prudent course is to petition the court for direction, and then act strictly as directed.[38] Where the statute prescribes the security it should be followed.[39]

151. **Same subject—Sale of real estate by guardian.**—The guardian cannot sell the ward's real estate without an order of the court. The proceeding is, usually: (1) Petition to the court for a license to sell, stating the reason for so doing, which is the insufficiency of the ward's other property; (2) filing a bond with the court to account for the proceeds of the sale; (3) selling as directed by the court, at public or private sale; (4) execution and delivery of deeds by the guardian and ward, without covenants; (5) properly applying the proceeds as ordered by the court, and this may include the reinvestment of a surplus fund, after the payment of debts and providing for the support of the child.[40] The guardian cannot bind his ward by any covenants of warranty in the deed, but he may bind himself. The deed has the effect of a quitclaim of the ward's interest.[41]

152. **Guardian's accounts.**—The guardian is required to account to the court appointing him, from

[37] Worrell's Appeal, 23 Pa. St. 44.

[38] O'Hara v. Shepherd, 3 Md. Ch. 306.

[39] McIntyre v. People, 103 Ill. 142.

[40] Shanks v. Seamonds & Campbell, 24 Iowa 131; Funk v. Rentchler, 134 Ind. 68, 33 N. E. 364; Schouler, Domestic Relations, § 360.

[41] State v. Clark, 28 Ind. 138; Byrd v. Turpin, 62 Ga. 591.

time to time, as to the condition of the ward's estate.[42] The first account shows the extent of the ward's property, and intermediate accounts, though required, are not conclusive even when judicially approved. They serve to keep the court informed of the general condition of the trust fund, and as to whether or not the guardian's bond should be increased, but they may be inquired into afterwards. At the expiration of the trust the guardian is required to file a final account, and in this account all previous accounts may be examined by the court to determine the fairness of his management of the ward's estate. When the final account has been examined and approved by the court, and not reversed on appeal, the account, together with those which preceded it, concludes all parties interested, and may not be reopened or annulled in any court. But in some states it might be set aside for fraud or manifest error.[43]

153. **Termination of the guardian's authority.**—Guardianship lasts until the end of the period for which it was instituted, but it may be sooner terminated by the death or marriage of the ward;[44] and the authority of a particular guardian may be terminated by death, resignation or removal before the period has expired. Formerly a woman guardian was deprived of her authority at marriage, but under modern statutes removing the old disabilities of married women, the marriage of a female guardian does not terminate the office, but she will be al-

[42] Curtis v. Devoe, 121 Cal. 468, 53 P. 936.

[43] Schouler, Domestic Relations, § 372; Cummings v. Cummings, 128 Mass. 532.

[44] In re Kincaid's Estate, 120 Cal. 203, 52 P. 492.

lowed to remain guardian by consent of her husband.[45]

Marriage of the ward terminates the power of the guardian over the ward's person, whether male or female.[46] The property of the male ward may be retained by the guardian, regardless of the marriage.

The guardianship continues until the ward has arrived at the age of majority, unless the statute has modified the rule. The guardianship of insane persons and spendthrifts, where authorized, continues according to the ward's necessity.

The guardian may be removed at any time for abuse of his trust. The statutes prescribe the causes for which he may be removed, and these include incompetency and removal from the state. When a guardian has been removed, or the ward is of age to choose a guardian, another is appointed to supersede the one removed.[47] Natural guardians who have once accepted must serve until released by the court.[48]

154. **Compensation of guardians.**—In England the rule has always prevailed that the services of executors, guardians and trustees should be treated as honorary and gratuitous, chancery allowing reimbursement for necessary expenses incurred. But this rule has not been followed in the American states. The local law either prescribes a certain per centum or commission as compensation, or per-

[45] Cotton's Guardian v. Wolf, 14 Bush 238 (Ky.).

[46] State v. Parrish, 1 Ind. App. 441, 27 N. E. 652.

[47] Schouler, Domestic Relations, chap. 3, art. IV.

[48] Browne, Domestic Relations, 93; Ex parte Crumb, 2 Johns. Ch. 439 (N. Y.).

mits the court to fix a just and reasonable compensation.[49]

155. **Rights and liabilities of the ward.**—During the guardianship the ward may restrain the guardian from committing waste, and may file an action by his next friend for an accounting. Also, when the guardianship has terminated he has an action for an account. This action must be brought in a reasonable time, as long acquiescence will debar the suit.[50]

The court will aid the ward to recover any property embezzled, concealed or conveyed by the guardian in fraud of his rights. The usual proceeding is by bill in equity. The statutes in some states provide for an inquisition for the discovery of property missing from the ward's estate.[51]

The guardian can bind the infant within the scope of his general powers, or as authorized by the court, but actions not within his powers and prejudicial to the ward may be disaffirmed by the ward on reaching majority. This is called the infant's right of election, but the court of equity may control this privilege and pronounce a doubtful transaction by the guardian good.[52]

A gift or conveyance from ward to guardian during or shortly after the termination of the guardianship is presumed fraudulent, and will not be sustained except on the clearest proof of good faith

[49] In the Matter of Roberts, 3 Johns. Ch. 43 (N. Y.); Gott v. Culp, 45 Mich. 265.

[50] Aaron v. Mendel, 78 Ky. 427.

[51] Cobb v. Kempton, 154 Mass. 266.

[52] Schouler, Domestic Relations, § 385.

on the part of the guardian. And this applies to anyone in loco parentis.[53] So where the guardian has taken real estate or mortgage notes in his own name but with the consideration coming from the ward's estate, he will be regarded as a trustee for the ward.[54]

The infant may have a special guardian appointed to manage a suit in court; this is called a guardian ad litem.

BIBLIOGRAPHY.

For supplemental reading the following works are recommended. They are set forth in the order of what the author believes to be their relative importance to the student of this text:

WILLS: *Jarman* on Wills (6th ed.); *Page* on Wills (1901); *Underhill* on Wills (1900); *Schouler* on Wills (2nd ed.); *Redfield* on Wills (3rd ed.); *Wigram* on Wills (1872, 2nd Am. ed.).

DESCENT AND DISTRIBUTION: *Abbott,* Probate Law.

ADMINISTRATION OF DECEDENTS' ESTATES: *Woerner,* American Law of Administration (2nd. ed.); *Schouler,* Executors and Administrators (3rd ed.); *Williams* on Executors (9th Eng. ed., 7th Am. ed.).

GUARDIAN AND WARD: *Woerner* on Guardianship; *Schouler,* Domestic Relations (4th ed.); *Reeves,* Domestic Relations (4th ed.).

[53] Berkmeyer v. Kellerman, 32 Ohio St. 239.
[54] Fogler v. Buck, 66 Me. 205.

LAW OF LANDLORD AND TENANT

BY

WILLIAM L. BURDICK, Ph.D., LL.B.*

INTRODUCTION

The phrase, Landlord and Tenant, covers the relation that exists by means of a contract, either express or implied, between two or more persons, for the letting and use of lands or buildings, either for a definite period of time, or for an uncertain period. The person owning and letting the land is called the landlord, and the person to whom the land is let is called the tenant. The contract between a landlord and his tenant is usually called a lease, and the term lessor is, consequently, often applied to the landlord, and the term lessee to the tenant.

In feudal times, in England, a landlord was the lord or proprietor of land, the owner of the fee, while the person who had the possession and use of the land, in return for services rendered to the lord, was known as the vassal, or the tenant of the lord. In modern

* Professor of Law, University of Kansas; Lecturer on Medical Jurisprudence, School of Medicine, University of Kansas. Author: "Elements of Sales," and articles in encyclopedias of law. Editor: "Cases on Sales." Contributor to legal periodicals.

times, however, a landlord is one who owns lands or tenements which he rents to others, in consideration, usually, of a certain rent, to be paid by such other persons.

Estates in land with regard to the amount or quantity of interest that one has therein, are divided into estates of freehold, and estates less than freehold. An estate of freehold is an estate of inheritance or for life, while estates less than freehold are of three kinds, namely, estates for years, estates at will, and estates by sufferance. These latter estates, that is, estates less than freehold, are generally considered under the title of Landlord and Tenant. Estates at will and estates by sufferance, however, are not very common in the modern law of landlord and tenant. It was the creation of estates for years in the English law of real property that gave rise to this present-day relationship.

CHAPTER I.

THE TENANCY.

1. **Subject matter.**—Any kind of real property, either corporeal or incorporeal, may be the subject of a lease.[1] Thus, lands and tenements, franchises, rights of common, rights of way, water courses, and rights to fish may be leased. Under the term "land," minerals and strata under the surface are included, as well as buildings upon the land. A lease may be taken for the mining of metals, or for the working of gas and oil wells. Turpentine trees may be the subject of a lease, as may be also growing timber, grass, and pasture land, likewise the right to cut and remove ice. By permission of a statute, a railroad company may lease its franchise and right of way.

Personal property may also be the subject of a lease, and the parties to such a lease are sometimes spoken of as landlord and tenant. This relationship is not, however, speaking strictly, created in such a case, since the nature of such a transaction is that of a bailment. Thus, live stock and farming implements upon the land, the furniture in a house, or the machinery in a mill, may be leased. The lessee is entitled to their use and profit during the term of his lease, but he cannot destroy or sell or give away such property. When live stock are leased, the calves, the lambs, and other young of such stock,

[1] Thomas v. West Jersey and Seashore R. R. Co., 101 U. S. 71, 25 L. Ed. 950.

belong to the lessee, since they are regarded as profits. Should any of the leased animals die during the term of the lease, the loss falls upon the lessor. In case of a lease of furniture, it is the usual practice to have a schedule of the property made out, accompanied with a covenant made by the lessee that he will return the property at the end of his term.

2. **Kinds of tenancy.**—By kinds of tenancy we mean the nature or length of the term that the tenant holds. The word tenant means "one who holds," and, as applied in general to lands, it refers to all kinds of estates, as for example, a fee simple, a life estate, an estate for years, an estate from year to year, an estate at will, or an estate by sufferance. The relationship of landlord and tenant cannot exist, however, unless some interest in the land remains in the landlord. Consequently, for our present purpose, an estate in fee simple, being the entire estate, does not need to be considered. We shall take up, however, in their order, the other estates mentioned herein, since they all constitute kinds of tenancy which may exist between a landlord and his tenant.

Tenancy for life. The relation of landlord and tenant does not often exist in the case of tenancies for life, yet a lease for life may be granted to one or more persons,[2] and where made for two or more persons the term may continue for their joint lives. A life tenancy, however, is different in many important respects from a lease for years. A tenancy for life is known at common law as a freehold and is usually created by a deed or will. It cannot be created by

[2] Warner v. Tanner, 38 Ohio St. 118.

parol, yet it may be created by a written lease, and rent for the term may be reserved. Where the lease does not state for whose life the tenancy is created, the lessee's life will be understood. A lease for life may be made contingent upon some future event, as for example, so long as the tenant pays a certain rent, or to husband and wife during the continuance of the marriage relation, or to a widow so long as she remains unmarried, or to one so long as he uses the property for a certain purpose. As already stated, however, life tenancies are not frequently met with between landlord and tenant, and are here dismissed without further consideration.

Tenancy for years. An estate for years is the most common kind of tenancy between landlord and tenant known to the common law. The term "years" means merely a unit of time. It may be for any period of time,—a week, a month, a year, or for any number of years. It must be, however, for a definite fixed period. At common law, an estate for years, no matter how long, is considered a chattel interest, or, in other words, personal property, and is not regarded as real property.[3] In some states, however, by force of statute, a tenancy for three years or more is treated as real property for some purposes. Under the feudal system, the smallest interest in land that could be created was a freehold, that is, an estate at least for life. A custom, however, grew up of granting land to tenants for stipulated periods. At first these periods were comparatively short, and in olden times a lease for more than forty years was held to be void,

[3] Shipley v. Smith, 162 Ind. 526, 70 N. E. 803.

but they were gradually increased in duration until at the present time leases may be made for such periods, for example, as ninety-nine years, or even for nine hundred and ninety-nine years, and there is a recorded instance of a lease for even ten thousand years.[4] Regardless, however, of the length of time, such estates are of less dignity than life estates, although no person could live as long as the designated period. The length of the period of an estate for years is called the term. At common law, such a term might be created by parol, but since the Statute of Frauds all leases to continue beyond a certain term of years, usually three, but varying in different states, can be created only by an instrument in writing. A freehold cannot be created to commence in the future, but a lease for a term of years may be so created.

From year to year. Tenancies from year to year were not known to the early common law. They grew up by judicial construction in connection with tenancies at will. In a tenancy at will, the term may be ended by either of the parties at his pleasure. In case, however, of a tenancy from year to year the tenancy is terminated, even against the will of the other party, only at the expiration of the period, whatever it may be, notice being usually required except where one of the parties has failed to perform his part of the contract. Since a tenancy from year to year is more favorable to the tenant than a tenancy at will, the courts favor construing the tenancy as one from year to year rather than as one at will,

[4] Cadwallader v. App, 81 Pa. St. 194.

where there is doubt or ambiguity in the written instrument as to whether it be one or the other of such tenancies.[5] A tenancy from year to year consists of a letting for an indefinite number of fixed periods, as from month to month, quarter to quarter, year to year. In this it differs from a tenancy for years, which, as we have seen, is a term of one fixed or certain period. In a tenancy from year to year, the period for which the rent is to be paid generally constitutes the unit of the fixed periods, although there is no definite agreement as to how many such fixed periods there shall be. In other words, the number of the fixed periods is indefinite. Thus, where a house is rented from month to month or from year to year, nothing being said as to the length of time the tenant shall have possession, a tenancy from year to year, or, as it is sometimes called, from month to month, is created.

A tenancy from year to year may be created by express agreement of the parties, or it may arise where a tenant holds over after the expiration of a fixed term. For example, if property is rented for a definite period of one month or one year, the tenancy thus created is a tenancy for years, as previously shown. In case, however, such a tenant, with the consent of the landlord, holds over after the month or the year, the law implies that the parties have agreed to a continuation for an equal term, and the landlord may charge the tenant rent for a period equal to the preceding definite term. Ordinarily a lease is made for a specified term, that is, for a term

[5] Currier v. Perley, 24 N. H. 219, 222.

of years, but if no particular period is mentioned, a tenancy from year to year will be implied. If the fixed period in a tenancy from year to year is a year, the fact that the rent is paid monthly does not change the duration of the period. Consequently, the holding over after the expiration of the year renders the tenant liable to the rent for another entire year. Where, however, the fixed period is from month to month, a tenancy sometimes called a tenancy from month to month in distinction from a tenancy from year to year, holding over after the month with the consent of the landlord obligates the tenant to pay only for the period of another month. In some states, tenancies from year to year have been abolished by statute.[6]

Tenancy at will. A tenancy at will is a letting for an indefinite period. It is a tenancy where the tenant enters into the possession of the leased property to hold the same during the joint will of himself and his landlord.[7] It arises, technically, where the lessor lets land to another to hold at the lessor's will, and continues, in theory, so long as the lessor consents. From early times, however, it has been held that a lease which is at the will of one of the parties is equally at the will of the other party. One of them is no more bound than the other.

A tenancy at will may be created either by express agreement of the parties, or by implication of law. The tenancy is not created, however, until the lessee enters, and in order to create such a tenancy the

[6] See Hunter v. Frost, 47 Minn. 1, 49 N. W. 327.
[7] Martin v. Knapp, 57 Iowa 336, 10 N. W. 721.

tenant must have entered lawfully. Frequently, in tenancies at will, no rent is reserved, and, in general, where one with the consent of the owner enters upon the possession of land for an unstated period, no rent being reserved, the tenancy is one at will.[8] Rent, however, may be expressly reserved, and where a tenancy at will is created by express agreement it takes effect as such, despite the fact that rent is reserved to be paid at stated periods. Generally, however, the reservation of rent for definite periods, indefinite in number, creates a tenancy from year to year, although it is held that, in absence of an expressed agreement as to the character of the tenancy, the reservation of a general rent, not payable at or for any definite periods, will not change a tenancy at will into one from year to year.

A tenancy at will may also arise by implication of law. Thus, where one enters into the possession of land under an agreement to purchase the same from the owner, he is, pending the consummation of the sale, a tenant at will. Such tenancies also arise where one is in possession under a void or a defective lease, or, as held in some states by force of statute or judicial construction, where a tenant for years holds over after the expiration of his term.[9] Generally, however, such a holding over creates, at common law, a tenancy at sufferance.

Tenancy at sufferance. Where one enters on land by lawful title, and after his title has ended remains

[8] Maher v. James Hanley Brewing Co., 23 R. I. 323, 50 Atl. 330.

[9] German State Bank v. Herron, 111 Iowa 25, 82 N. W. 430; Talamo v. Spitzmiller, 120 N. Y. 37, 23 N. E. 980, LEADING ILLUSTRATIVE CASES.

in possession without obtaining the consent of the landlord, he is said to be a tenant at sufferance. A tenancy at sufferance differs from a tenancy at will in that the tenant at sufferance holds over without the landlord's consent, while assent by the landlord to the holding over creates a tenancy at will. Tenancy at sufferance does not arise, however, upon the holding over by one whose title was created by an act of law. The original tenancy must have been created by the parties. A tenancy at sufferance requires no notice to terminate it. The landlord may enter or the tenant may leave at any time without giving notice. Strictly speaking, a tenancy by sufferance is not a tenancy at all, since the tenant is not in possession with the consent of the owner, but without his consent. Where the continued possession is consented to, the tenancy in the absence of any agreement to the contrary would become a tenancy at will.

In order to create a tenancy at sufferance it is necessary that the tenant should have entered into possession of the premises lawfully, yet he need not have come in under any contract of letting. However, as stated above, the tenancy does not arise by a holding over after the termination of a right of possession created by an act of law, because if one comes into possession by an act of law and then thereafter holds over, he is regarded as a trespasser, which is not the case where there exists a tenancy at sufferance. In case, however, a tenant at sufferance refuses to leave when ordered to do so by the landlord, he does become a trespasser. A tenant at sufferance is not liable for rent unless some statute so provides, and at common

law no action can be maintained against a tenant at sufferance to recover for the use and occupation of the premises.[10] A tenant by sufferance does not hold by adverse possession and cannot defeat the title of his landlord, no matter how long he may remain in possession of the premises.

Letting land on shares. Land may be let for the purpose of raising a crop, and the relationship that exists between the owner of the land and the cropper may be that of landlord and tenant. Where, however, land is rented on shares, such a relationship is not necessarily created, since the cultivator may be either the servant or the partner of the owner. While such cases may give rise to a presumption of the relation of landlord and tenant, yet the intention of the parties is the true test of their relationship. In some states, however, the statutes provide that a contract between one who furnishes the land and another who furnishes the labor, under an agreement to share the crop between them, creates the relation of landlord and tenant. Some of the old cases held that where the parties were to share only one crop they were to be regarded as tenants in common, but where they were to share more than one crop, the relation of landlord and tenant was created.[11] Such a distinction, however, is obsolete and, as stated above, the prevailing rule is that the intention of the parties as expressed by the language used by them in making the contract determines the nature of the relation.

Letting of lodgings. Although a suite of rooms or

[10] Martin v. Allen, 67 Kan. 758, 74 Pac. 249.
[11] Jackson v. Brownell, 1 Johns. 267 (N. Y.), 3 Am. Dec. 326.

a single room may be the subject of a lease, yet, ordinarily, the mere letting of lodgings does not give rise to the relation of landlord and tenant. The term lodger is usually understood to mean one who occupies a portion of a house which is in the possession or under the control of another. A lodger, as such, has no interest in the property itself. On the other hand, where one occupies a dwelling house and rents a flat, or other tenement therein, the relation of landlord and tenant may be, and generally is, created as much as if the houses were separate buildings. Where furnished apartments are rented, the contract is frequently of a dual character, that is, consisting of a lease of real property and also of the renting of personal property. Where an unfurnished house or room is rented, there is no implied contract or covenant that the place is habitable or fit for the purpose for which it was rented. In case, however, of a furnished room, the contrary is true, and the owner is regarded as impliedly agreeing that the place is fit for the immediate tenancy and use of the tenant. Thus, in one case, a furnished house was let to a tenant for five or six weeks. The tenant went into possession, but found the place and furniture so infested with bugs as to be absolutely untenantable. The tenant complained to the landlord, who endeavored to exterminate the vermin, but in this he was unsuccessful, and the tenant moved out, having occupied the premises less than a week. He paid for a week's rent, and in an action by the owner to recover the rent for the remaining five weeks, it was held that he could not do so, because one who lets a ready-furnished house

does so under the implied covenant that the house is in a fit state to be inhabited.[12]

Where lodgings are let for immoral purposes no action for the recovery of rent due for the same can be maintained. The duration of the tenancy in the case of the letting of furnished rooms and lodgings is usually governed by the periods fixed for the payment of rent, as for example, weekly, monthly, or quarterly, according to the contract. Although lodgers are not strictly tenants, yet the rights of the lodger to the use and enjoyment of the premises included within his contract are substantially the same as the rights of a tenant.

3. **Duration of tenancy.**—In the foregoing discussion of the various kinds of tenancy, tenancies for years and from year to year, something has already been said relative to the duration of the tenancy. Yet there are some particular matters in connection with the commencement and the termination of tenancies that require further consideration. In a tenancy for years, the commencement of the tenancy is generally determined by the language of the lease. The tenancy may be created to begin at once or to commence some time in the future. Where the lease reads for the term to commence "from" a certain day, the day specified may or may not be included in the term, according to the construction of the contract. Thus, in one case where a lease ran from the 1st day of April for one year, it was held that the term com-

[12] Ingalls v. Hobbs, 156 Mass. 348, 31 N. E. 286, 32 Am. St. Rep. 460, LEADING ILLUSTRATIVE CASES. For a contrary view, however, see Murray v. Albertson, 50 N. J. L. 167, 7 Am. St. Rep. 787.

menced on that day, while in another case a lease for a term of years, from the 1st day of July, was held to begin on the 2nd day of July. The general rule in such cases is that the court will try to give effect to the intention of the parties. The rule usually followed, however, in cases where the lease reads "from" a certain day "to" a certain day, is to exclude one of the dates and to include the other, according to the apparent intention of the contract.[13]

Likewise, the duration of the term may depend upon the construction of the lease, since if the term is not clearly expressed, it may be necessary to refer to other parts of the lease, or to the circumstances under which it was made, to ascertain what the parties really intended. In case of doubt as to the duration of the lease, it will be construed against the lessor and in favor of the tenant. Generally, where the contract provides that the term shall end on a certain day the tenant has the whole of that day, although it has been held that by force of custom the tenancy will terminate at noon of the day specified. In some states the statutes provide that in the absence of any express agreement as to the termination of a tenancy the term shall end on a specified day, as for example the 1st day of May.[14] In any case, however, the contracting parties may, of course, agree that the tenancy shall be terminated by due notice given by one party to the other.

Where a lease is made to begin from an impossible or uncertain date, as for example, from the 31st day

[13] Farwell v. Rogers, 4 Cush. 460 (Mass.).

[14] See Spies v. Voss, 16 Daly 171 (N. Y.), 9 N. Y. Suppl. 532.

of February, it will take effect from the time of the delivery of the lease. Where, on the other hand, a lease is made, say, on the 22nd day of March, to hold from the 1st day of January, without stating the year, so that it is impossible to determine what January is meant, the lease is void. A tenancy from year to year is terminated only by a notice to quit, the time of this notice being regulated by statute. In case, however, of a tenancy from month to month, it is a general rule, in the absence of any statute to the contrary, that a tenant is entitled to a month's notice to quit. As previously stated, a tenancy at will may be determined at the will of either party, and such a tenancy is terminated by implication of law upon the death of either the lessor or the lessee. A tenancy at will is, moreover, determined by any unlawful act of the tenant, where, for example, he is guilty of committing waste, or where he denies his landlord's title. A tenant at will is entitled to a reasonable notice to quit, and the time at which this notice should be given is fixed in many states by statute. A tenant at sufferance, however, is not entitled to any notice to quit unless the statute so provides.

Interesse termini. At common law, the tenant's interest in the land leased to him does not begin until he enters upon the land. Before the tenant's entry the entire interest in the land is in the lessor and the only right or interest that the tenant has is his right to enter upon the land when the term commences. This right to enter was called in the law Latin of the Middle Ages the tenant's *interesse termini.* In other words, it is the interest which the tenant has before

he takes possession of the land by virtue of his lease, or his interest between the time of the making of the lease and his entry into possession. This interest may be assigned by the tenant, and it is also held that it is such an interest as will enable him to maintain an action of ejectment against one who may be in the unlawful possession of the property. A lessee who fails or neglects to enter upon his term at its commencement will, nevertheless, be liable to his landlord for rent, since his obligation to pay rent depends upon his contract and not upon the fact of his entry upon the land.

Assignment and subletting. Frequently the terms assignment and subletting are used in connection with various kinds of tenancy, and it is important that the distinction between these two words be clearly understood. By an assignment we mean the transfer of all of the lessee's estate. By a subletting or a subleasing is meant the transfer of any part of the lessee's interest less than the whole. If the tenant retains any interest in himself the transfer is a sublease and not an assignment.[15] Thus, where a tenant for a term of five years leases to another tenant for a term of four years, the transaction is a sublease and not an assignment. To constitute an assignment it would be necessary for the first tenant to transfer to some other person his entire term, or in this case the entire period of five years. This distinction is important at times, since a covenant entered into by a tenant not to assign his term would not be broken by the fact that the tenant sublet a portion of his

[15] Sexton v. Chicago Storage Co., 129 Ill. 318, 21 N. E. 920.

term; and, on the other hand, an agreement not to sublet would not be broken by an assignment.[16] In case of an assignment there must be an actual transfer of the tenant's interest, since a mere agreement to assign the term does not amount to an assignment of it. In order to constitute an assignment, it is not necessary, however, that all of the land or premises in the possession of the tenant should be transferred, since it is not the quantity of the premises but the quantity of the interest that governs. For example, where a tenant of a hundred and sixty acre farm for a term of five years leases eighty acres of it to another for a term of five years, this is not a sublease but an assignment of the eighty acres. The right of tenants to assign or to sublet is considered in a subsequent chapter.

[16] Field v. Mills, 33 N. J. L. 254.

CHAPTER II.

THE RELATION OF LANDLORD AND TENANT.

4. **How created.**—The relation of landlord and tenant arises from contract, usually called lease or demise, which may be either express or implied and is governed by the general rules relating to contracts. Usually the contract is express, and may be created by any words which show an intention on the part of the landlord to give possession, and, on the other hand, an intention on the part of the tenant to take possession. While the relationship of landlord and tenant is created by the contract or lease, yet, speaking strictly, the relationship is not perfected until the tenant enters into possession of the property. In order that the relationship of landlord and tenant may be established, the tenant must enter upon the land with the permission of the landlord and in subordination to the landlord's title.

By implication. As said in the preceding paragraph, the contract creating the relationship of landlord and tenant may be implied. It is not necessary that there should be a formal letting or leasing, but if the conduct of the parties and the circumstances of the taking possession of the property are such as to show an intention to create the relation, it is sufficient.[17] In such a case the relation is as much established as if it had been formed by express agreement.

[17] Rainey v. Capps, 22 Ala. 288.

The mere fact, however, that one is in lawful possession of the premises of another does not in itself imply the relation of landlord and tenant, because, as said before, the occupancy of the premises must be both with the consent of the owner and with an intention on the part of the tenant to recognize the owner as landlord. One may, for example, be in the lawful possession of property under a contract to purchase, or as a servant, or, again, as an agent of the owner. Where, however, one has paid rent for the use and occupation of the premises, or has duly acknowledged the owner as his landlord; or where one enters upon the land of another without his permission, yet at the time disclaiming any title in himself, these are instances of cases that have been held tenancies by implication. Likewise the relationship may arise when a tenant has entered under a void lease, because, although the lease is invalid, nevertheless it is manifestly the intention of the parties to create the relationship, and consequently the law will treat it as established.[18] Moreover, where one enters upon the property of another under an agreement for a lease and takes exclusive possession thereof, he will be regarded as the tenant of the owner.

Reservation of rent. Usually, by the terms of a contract creating the relationship of landlord and tenant, the tenant agrees to pay to the landlord a certain rent at fixed periods. This is what is known as a reservation of rent to the lessor. That is, it is what he reserves to himself out of the estate during its occupation by his tenant. In early days, the rent

[18] Bolles v. Duff, 54 Barb. 215 (N. Y.), 37 How. Pr. 162.

consisted of service rendered by the tenant, or of a share of the products of the soil. In modern times, however, it generally consists in the payment of a certain sum of money. In order to create the relationship of landlord and tenant it is not necessary, however, that any rent should be reserved. The lease may be for a lump sum. When, however, the relationship is established, whether by express agreement or by implication, the fact that nothing was said by the parties concerning the rent will not relieve the tenant from the obligation to pay the same, if from the circumstances of the case the intention to pay rent can be implied. Thus, where one has entered upon the use and occupation of land with the landlord's consent, nothing being said as to the rent, he will be liable for the reasonable rent of the premises, in the absence of any circumstances showing a mutual contrary intention.[19]

5. **Capacity of parties.—In general.**—As a general rule, any person who is the owner of real estate and who is under no legal disability, may give a lease of his lands to a tenant. It is essential, however, that, as a rule, the one who makes the lease should be in possession of the property at the time the lease is made. But, on the other hand, a lessee for years may, as already stated, assign his lease before his entry upon the possession. The heir of an owner of land may also make a lease of inherited premises, although he may not have entered upon the same. As a general rule, however, a lessor must be in pos-

[19] Story v. McCormick, 70 Kan. 323, 78 Pac. 819, LEADING ILLUSTRATIVE CASES.

session in order to have capacity to create a valid lease. The incapacity of certain persons to make leases, by reason of their legal disability, is discussed in the following paragraphs.

Infants. A lease made by a minor is voidable. Where, however, an adult person becomes the tenant of an infant landlord, the adult will be bound, unless the landlord chooses to annul the lease. A lease made by an infant may be disaffirmed before his majority, at his majority, or within a reasonable time after he reaches his majority. Where, however, an infant's lease is in the form of a deed, he cannot disaffirm it until he becomes of age. The fact that an infant lessor has accepted rent from his tenant does not prevent him from avoiding the lease. If a lease is made to an infant, it is likewise voidable by him as tenant and it is the prevailing rule that if an infant tenant disaffirms a lease after he has become of age, he will not be liable for rent. In case, however, of the use and occupation of premises by a minor, where such use and occupation could be regarded as a necessary, the infant would be liable for the reasonable rent of the premises, not on the ground, however, of his contract to pay for the same, but on the ground of the obligation imposed upon him by the law to return a reasonable compensation for the benefit received.

The right of an infant to avoid a lease on the ground of his infancy is a personal right and cannot be taken advantage of by any one except himself or his personal representative. Moreover, an infant's ratification of a lease after he becomes of age need

not be expressed or formal, since any acts on his part which show an intention to abide by the terms of the lease made, amount to a ratification.

Insane persons. In the case of insane persons, including in this classification lunatics, idiots, and intoxicated persons, it is the general rule that their leases, while not absolutely void, are nevertheless voidable, not only by such persons themselves, but also by their heirs or legal representatives. The test of mental incapacity in these cases is whether or not at the time of making the contract the lessor was capable of understanding the import and nature of his act. A distinction is sometimes made between the effect of a lease made by a person who is merely alleged to be non compos mentis and one who has been judicially declared insane and placed under guardianship. In the latter case, a contract made by the person under guardianship would be absolutely void. An insane person may, however, have periods in which he is in reasonable possession of his mental faculties, or, as it is called, periods of lucid intervals. The contract for the letting or hiring of premises made at such a time by such a person would, of course, be valid. Mere weakness of mind or intellect, or even advanced age, does not in itself render one incapable of making a valid lease, either as landlord or as tenant. Such a condition may be shown for the purpose of proving that undue influence or other fraud was practiced upon a party to a lease, but in the absence of unfair advantage, if the person who made or took the lease realized what he was doing and was able to understand the nature of his act, it will

generally be valid. In the case of a drunken person, slight intoxication does not render one incapable of being a party to a lease, or make his act in connection therewith voidable. The incapacity of intoxicated persons falls under the same head as that of insane persons. The point to be determined in each case is whether or not the person in question was in such a state or condition of intoxication as to be deprived for the time being of the exercise of his reason.

Married women. At common law the contracts of a married woman are absolutely void. Moreover, at common law a married woman's real property vests in her husband during the continuance of the marriage, and the right to dispose of his interest in her lands, or to lease the same, belongs to him alone. Consequently, during coverture, a lease of her lands made by a married woman is null and void. Where, however, a lease of his wife's lands is made by a husband under his common law right for a term that extends beyond the coverture, the widow may elect either to affirm or disaffirm the lease, and by accepting rent after the decease of her husband she will generally be held to have ratified the lease. It has, moreover, been held in some cases that a lease made by a married woman is not absolutely void, as would be a conveyance of her real property, but that she might confirm the same after the death of her husband. At common law a lease of lands may be made by a third person to a married woman, subject, however, to her husband's rights or property therein, but she would have no capacity to enter into any

contract to pay rent for the same. Moreover, since the husband is liable for her support, a married woman's occupancy of the house where she resides with her husband does not render her liable for its rent.

The disability of married women to make contracts has been largely removed in every state by modern statutes. Under such statutes, in connection with her right to make contracts in relation to her separate property, and by virtue of her power to make contracts in general, she may be able to make a valid lease.

Guardians. An infant's natural guardian, that is, his father or mother, has no control of his property and, therefore, cannot make a lease of the same. Guardians, however, who are appointed by the will of a parent, or who are appointed by the courts, may make such leases of their ward's property as may be authorized by the statutes, or by the direction of the courts.

Executors and administrators. At common law, upon the decease of a person, the title to his personal property is in his executor or administrator, while the title to his real estate is in his heirs. Consequently, in absence of a statute giving an executor or administrator authority to lease real property, such a lease cannot be executed by such a person. In a number of states, however, the right to make leases is given by statute for the purpose of administering the affairs of the estate. In connection with tenancy for years it has been previously stated that at common law such an estate, no matter how long, is re-

garded as personal property instead of real property. Consequently, at the common law such estates are within the control of executors and administrators and may be leased by them, the rents received from such leases being applied to the purposes of administration.[20] Where an executor or an administrator leases lands by authority of statute, the provisions of the statute regarding the making of such leases must be carefully observed.

Agents. A lease may be made by the agent of either the landlord or the tenant. The general rules governing agency apply to the acts of agents when making leases, the same as when making other contracts. In order, however, that the principal may be bound and not the agent, it is important in the execution of a lease that the fact of the agency be disclosed. However, if an agent exceeds his authority, the general rule is that the agent himself will be bound and not his principal.

In case the lease is in writing, it is held to be necessary, under some of the statutes, that the agent's authority to execute the lease should also be in writing. Where an agent executes a lease he should sign it with the name of his principal, adding his own name to the signature, as for example, "Richard Roe, by John Doe, his agent." Leases of household premises are very frequently made by real-estate agents, they being authorized, by the owners of the premises or by those who may be seeking locations, to execute the contract. In all such cases the binding force of the lease depends upon the authority of the real-estate

[20] Chandler v. Rider, 102 Mass. 268.

agent to execute the same, and upon the further fact of his obedience to the instructions given him.

Corporations. A corporation at common law may purchase and hold lands and as a necessary right of such ownership may convey or lease the same. A lease made by a corporation is generally signed by its president and witnessed by its secretary, although the requirements in these particulars are governed by the statutes of the various states, which should be consulted in any particular case. Where a parol lease if made by an individual would be valid, a similar lease made by a corporation under similar circumstances will likewise be valid.[21]

6. **Distinguished from other relations.**—In the preceding chapter attention was called to the fact that the relationship of landlord and tenant is not necessarily created when land is let on shares or in the letting of lodgings. Since the law governing the relation of landlord and tenant is not the same as that which applies to other relations that may sometimes be mistaken for it, it is important that the essential differences between this relationship and certain others be pointed out.

Master and servant. The mere fact that one occupies the premises of another does not, as has been already shown, create in itself the relationship of landlord and tenant. Thus, not only household servants but servants in other capacities may, for the purpose of performing their work, occupy lands or houses of their employers. The same may also be true in contracts for services which do not involve

[21] Jackson v. Campbell, 5 Wend. 572 (N. Y.).

the relation of master and servant. For example, where a school-teacher was given possession by the school district of certain rooms in a school building, such rooms not being employed for school purposes, but used by the teacher for convenience in carrying on his work, there being no contract of letting and no rent paid, the relationship of landlord and tenant did not exist. Likewise, where a man employed by the month occupies a tenement of his employer, receiving the use of the same as part compensation for his services, the relationship between the parties is that of master and servant and not that of landlord and tenant.[22] On the other hand, an agreement between a railroad company and an individual that the latter shall occupy a section-house of the company and shall board the section hands and other employees of the company there at an agreed-upon rate, the company agreeing to aid in collecting the board of the workmen by retaining the amount from their wages, does not create the relation of master and servant between the company and the individual, but does create the relationship of landlord and tenant.

Partners. The question sometimes arises whether the relationship between two or more persons is that of landlord and tenant or that of partnership. In this, as in all other relations that are of a kindred nature to that of landlord and tenant, the question to be decided in each and every case is, What was the intention of the parties, as determined by all

[22] Davis v. Williams, 130 Ala. 530, 30 So. 488, LEADING ILLUSTRATIVE CASES.

of the facts in each instance? For example, two men were the joint owners of a certain hotel. They drew up a contract which recited the fact of their ownership of the property "in partnership" and agreed that one of the parties should assume charge of the property and conduct it as a hotel for a certain term of years. It was also agreed that the party who was to conduct the hotel should pay, at the end of each year, to "the firm" a certain amount. This was held, upon the facts of the case, not to be a partnership which could be terminated by either party, but a renting by one party to the other.[23] In the renting of land on shares, as we have previously noted, the relationship between the parties may be that of partners instead of landlord and tenant.

Further illustrations. In addition to the relations of master and servant, and partners, already considered, questions may also arise whether the relation between two or more parties, instead of being that of landlord and tenant, is that of principal and agent, or of vendor and purchaser, or of trustee and beneficiary, or of mortgagor and mortgagee. In the case of principal and agent, one may be in the possession of premises merely as the agent of the owner and not in any respect as his tenant, just as in the case of master and servant. Also one may be in possession of property as the purchaser thereof, or under an agreement to purchase, without being brought within the relationship of landlord and tenant. Whether an instrument in writing is a lease or whether it is a contract to sell, is a question of law

[23] Baughman v. Portman, 14 S. W. 342 (Ky., 1890).

for the courts to decide, and in connection with such cases the question of whether the payment of money by the person in possession to the owner of the property was in the nature of an installment payment on the price, or of rent for the use and occupation of the property, becomes an important one. Likewise, land or other property may be occupied by one as a trustee for another, no relation of landlord and tenant existing between them. A mortgagee may also be in possession of the property of his mortgagor. This is his right at common law, and it frequently arises in modern times by virtue of agreements between the parties. In such a case, however, the mortgagee is not the tenant of his mortgagor and accordingly is not liable for the rent of the premises.

7. **The landlord's reversion.**—In our system of law there can be no such thing as a perpetual lease, since the lease transfers an interest to the lessee in the property less than the interest which the lessor has. Consequently, the lessor always has remaining in him some interest over and above what the lessee has. This is known as the lessor's, or landlord's, reversion. This also distinguishes a conveyance from a lease. In a conveyance one's entire interest is assigned; in a lease something less than the interest that the lessor himself possesses.[24]

8. **Attornment of tenant.**—Under the English feudal system the lord of the land could not dispose of his rights in the land, known as his seigniory, without the consent of his vassal or tenant. When this consent was obtained it was known as attorn-

[24] McMurphy v. Minot, 4 N. H. 251.

ment, and was merely the tenant's consent to a new landlord, or, what is the same thing, his agreement to become the tenant of the new landlord.[25] Likewise, when, upon the death of a landlord, the tenant paid rent to the heir, he was said to attorn to the new landlord. The English common law of attornment has never been, however, a part of the common law of this country, and a lessor may dispose of his estate in the land or of his reversion, so that his grantee will have the same rights as himself in respect to the land. It is not essential that the tenant should consent to such conveyances. In some states, however, it has been held that attornment is still necessary in order to enable the grantee of the landlord's reversion to sue for rents in his own name.[26]

[25] Lindley v. Dakin, 13 Ind. 388.

[26] Marney v. Byrd, 11 Hump. 95 (Tenn.); Fisher v. Deering, 60 Ill. 114. (Rule in Illinois now changed by statute, however.) See Howland v. White, 48 Ill. App. 236.

CHAPTER III.

LEASES.

9. **Definition of a lease.**—The relation of landlord and tenant is created by a contract called a lease. The parties are known as lessor and lessee. A lease is a species of contract for the possession and profits of lands and tenements either for life, or for a certain period of time, or during the pleasure of the parties, always, however, for a less term than the party conveying has in the premises. It is otherwise defined as "a contract by which one person divests himself of, and another takes the possession of, lands or chattels for a term, whether long or short"; or as "a contract for the possession and profits of lands and tenements on one side, and a recompense of rent or other income on the other."[27] The word "lease" means to let, to farm out, to rent; although the word "leased" is not quite the same as "rented," since the word "rented" may properly apply to the act of either the lessor or lessee, while the word "leased" is more appropriately used to describe the act of the lessor only.

10. **Distinguished from an agreement for a lease.**—A lease is to be distinguished from a mere agreement for a lease, since there is a marked difference in the rights of the parties, accordingly as it may be one or the other. Under a lease, the lessee acquires a distinct interest in the land, while

[27] Sawyer v. Hanson, 24 Me. 542, 545.

under an agreement for a lease he has merely an executory right to have the owner execute a lease in accordance with the terms of the agreement. Should the owner refuse or fail to do this, or should the other party refuse to comply with his part of the agreement, the party injured has an action for damages, based upon the breach of the contract. Whether a contract is in fact a lease or an agreement for a lease, is, at times, not perfectly clear. The question is always one of the intention of the parties,[28] but since this intention must be gathered from the language used in the contract, the distinction is sometimes difficult to make, owing to the lack of clearness in the language employed. The general rule, however, is that where the contract contains all the elements of a lease, namely, a specified property, a specified term, a definite rent, and an agreement as to the time and manner of payment, the contract will operate as a lease. Moreover, as a rule, such words as "lets," "hereby lets," and even "agrees to let," or "agrees to lease," will be taken to mean an intention to create a present lease.

11. **Distinguished from a license.**—A lease also differs from a license. Under a lease, the tenant has the right to the exclusive possession of the property. One, however, who has merely a license has only a right to use the property in a certain way, and on certain conditions, the property itself remaining in the possession and control of the owner. Thus, an agreement to let a concert hall for four days, for the purpose of giving concerts, the owner not yielding

[28] Arnold v. R. Rothschild's Sons Co., 164 N. Y. 562, 58 N. E. 1085.

up the exclusive possession of the premises, is a license, and not a lease. The same has also been held with regard to the letting of a bookstall on a railway platform.

12. **Distinguished from a conveyance.**—Again, a question may arise whether a certain instrument is a lease or an absolute conveyance, or, at least, a contract to sell or convey. A conveyance may, for example, be in the form of a lease, yet it will not be construed as a lease but as an actual conveyance if from the whole instrument it appears that the parties never intended to create the relation of landlord and tenant. While the reservation of a rent generally shows an intention to create a lease, yet land may be absolutely sold and the price paid in the form of an annual rent. Where, for example, as illustrated in some old and quaint forms, an instrument purports to give lands to a lessee, his heirs and assigns, "as long as wood grows and water runs," reserving as rent "one barley corn each year," the instrument conveys, for all practical purposes, the entire estate.

13. **Distinguished from contract to sell.**—A contract between the owner of the land and some other person for the sale of the premises binds the owner to convey to the purchaser all the interest the owner possesses; consequently a contract to sell the land is different from a lease. Whether an agreement, however, is a lease or a contract to sell, cannot always be determined by the mere words used, and hence arises the rule that the intention of the parties, as gathered from the entire instrument, is the true test

of the nature of the transaction. A written contract may, however, contain both a lease and an agreement to sell, or a lease with an option to buy the property. Likewise, a contract for the sale of land may provide that, if the installments are not paid as agreed, the transaction shall be regarded as a lease, and the money previously paid, if any, be applied as rent for the property.

14. **Requirements of a lease.—In general.**—No particular or technical words are necessary in order to create a lease. It is not even essential that the word "lease" should be used. The important thing is to express the intention of the parties to create the relation of landlord and tenant. This may be done by express words to that effect, or by other apt words that show an equivalent intention. Speaking generally, a lease usually contains the date, the names of the parties, the consideration, or rent reserved, the description of the premises, the reservations and restrictions, if any, and also the covenants and conditions, if any. It should be duly executed, delivered, and accepted.

Illegal leases. A lease will not be valid if made for an illegal purpose. Thus, a lease of premises for the purpose of carrying on the illegal sale of intoxicating liquors will be void, as will also a lease where the landlord knows that the place is to be used for the purpose of gambling, prostitution, or other illegal object. Some cases distinguish, however, between a landlord's mere knowledge of the intended illegal use, and his participation therein, holding that unless he shares in or furthers the unlawful purpose, the

lease is valid, and that he may recover the rent for the premises.[29]

In order to render a lease invalid, it must be shown that the intention of the illegal use was mutual to both lessor and lessee. The guilty knowledge of an agent may, however, be imputed to the principal. Where the lease is invalid by reason of its illegality, the lessor cannot maintain an action upon the contract to pay him rent, or upon any implied obligation on the part of the tenant to pay for the use and occupation of the premises. Moreover, if a lease is illegal when made, it remains invalid although assigned.

Parol leases. A lease may be made orally at common law. In other words, no lease need be in writing unless some statute requires it, and leases for short terms may, as a rule, be made verbally, since the statutes requiring leases to be made in writing apply, generally, to terms for more than a year. In the State of Louisiana, a lease may be made either orally or in writing. In some states, however, no exception is made as to short-term oral leases, and all term leases must be in writing. Such is the law, unless changed by recent statutes, in Maine, Massachusetts, Missouri, New Hampshire, New Mexico, Ohio, Vermont, and Washington. In these States, a verbal letting of premises creates merely a tenancy at will.[30] In cases where a verbal lease is valid, it may be made by any words which show an intention to

[29] Frank v. McDonald, 86 Ill. App. 336; Miller v. Maguire, 18 R. I. 770, 30 Atl. 966.

[30] Matthews v. Carlton, 189 Mass. 285, 75 N. E. 637, LEADING ILLUSTRATIVE CASES.

give exclusive possession of the property for the term.

Writing required, when. By the English Statute of Frauds, which was passed in 1676, all leases of lands, tenements, or hereditaments were required to be in writing and signed by the parties making the same, or by their duly authorized agents. The Statute further provided that, unless in writing, leases should have the force and effect of tenancies at will only. The Statute, however, excepted from its requirements leases for three years or less. This Statute has been copied more or less literally in our American states, the short-term periods excepted from the provisions of the Statute varying from terms exceeding one year in duration up to seven years, according to the jurisdiction.[31] In some states, however, as stated in the preceding paragraph, the short-term exception is omitted altogether.

Some of the states follow the English Statute in providing that where the lease should be in writing, if it is not in fact reduced to writing, it will have the force and effect of a tenancy at will only. In order to determine the requirements in any particular state the Statute of such state must be, of course, consulted. The short-term period is generally computed from the day of the making of the lease. Consequently, even if the tenancy does not begin at once, it must expire within the period specified by the Statute. This question is governed, however, in some

[31] One year in most states; two years in Florida; three years in Indiana, New Jersey, and Pennsylvania; five years in Virginia; seven years in Maryland.

states by the language of the Statute itself. Thus, the Statute may read that parol (taken in the sense of oral) leases for a period of more than one year *from the making thereof* shall be void. Where, however, the Statute provides that a parol lease for a period of more than one year *from the time of entry* shall be void, a verbal lease for a year only, such lease to begin at some future time, would be good. While it is customary to date a lease, yet a written lease will not be invalid because it contains no date. If a lease contains no date, it will be presumed to take effect upon its delivery. In case of a verbal lease, in absence of other evidence as to the beginning of the term, the tenancy will begin when the tenant comes into possession.

Description of the parties and property. The capacity of parties to execute leases has already been considered. The lease should contain the names of the parties, and the omission of the lessee's name from the lease will render the instrument void. A person, however, who signs a lease will be bound, although he may have been misnamed in the body of the instrument. Moreover, it has been held that where a lease is executed by several parties as lessees, the omission from the granting clause of the lease of one of such lessees is immaterial.

The property leased should be sufficiently described so that it may be identified.[32] All the particulars of the property need not, however, be set forth. The lease of a building will include the land on which it stands, and where agricultural land is leased under

[32] Dixon v. Finnegan, 182 Mo. 111, 81 S. W. 449.

the general description of "a farm," it will include all the houses and lands pertaining to such farm. While parol evidence is not admissible to alter or to contradict the written description of the premises, yet it may be admitted for the purpose of making clear what premises were intended. But an entire omission in the description of the premises cannot be supplied by verbal testimony. A description of a house by its street number may, however, be sufficient. In general, the lease of sufficiently described premises will carry with it all the rights to the use and enjoyment of such property that are naturally and necessarily incident to it, including easements and fixtures. Only so much will pass, however, as will meet the requirements of the particular lease, and, although, as stated above, the lease of a building includes the land on which it stands, yet a lease of certain rooms in a building will not be construed as a lease of the land, but only as a lease of such apartments alone.[33]

The consideration. As a rule, a lease should contain some consideration. This may be what is usually called the rent, meaning by that periodic payments for the use of the premises, or it may be a lump sum, or services to be rendered by the lessee, or, again, some specified part of the crops, income, or profits of the premises. The natural love and affection which one party has for another may also be a good consideration. As we have seen, however, a reservation of rent by the landlord is not necessary in order to create the relation of landlord and tenant, and a lease will

[33] Leiferman v. Osten, 167 Ill. 93, 47 N. E. 203.

not be invalid because it contains no reservation of rent. If a lease is made by an instrument under seal, it cannot be defeated on the ground of lack of consideration, since the seal is said to import a consideration.[34]

Duration of the term. As we have seen from a preceding chapter, tenancies may be of different kinds, meaning by that the nature or length of the term that the tenant is to hold. We also saw that these tenancies might be for life, for a term of years, from year to year, or at will. Accordingly, it is important that a lease should designate or specify the duration of the term. This should be expressed in certain and definite language, so that the commencement of the term and its termination may be clearly understood. Unless it is thus clearly expressed, the tenancy will be construed as one at will. In one case, where a lease was made of a certain building for so long as it should be used for a certain business, it was held that this did not create a lease for a term of years, since it was not sufficiently definite.[35] A lease, however, may be made for a term to begin at some future time, even though such future time cannot be definitely fixed at the date of the making of the lease, provided it can be ascertained in the future. This is made possible under the familiar maxim of the law that "a thing is definite if it can be made definite." For example, a lease for a term of years to begin when a certain house is completed and ready for occupancy, is a valid lease,

[34] Drew v. Buck, 12 Hun 267 (N. Y.).
[35] Melhop v. Meinhart, 70 Iowa 685, 28 N. W. 545.

since, although to begin in the future at a time now uncertain, it can be rendered certain when the event takes place.[36]

Other formal parts. In addition to the parts of a formal lease already considered, a lease sometimes contains other matters, such as reservations, exceptions, and conditions. It also usually contains the covenants entered into by either the lessor or the lessee. By a reservation in a lease, in contrast with the term exception, is meant some right which the landlord creates for himself out of the leased premises, as for example, the reservation of a right of way or other easements over the leased premises. By an exception is meant some part or parts of the leased premises which do not pass to the lessee. Thus, the landlord may except from the lease of a house certain rooms, or from the lease of a farm certain fields, or he may except from the lease the timber growing on the land, or the minerals in it.

By a condition in a lease is meant either some restriction imposed upon the lessee in reference to his use and enjoyment of the premises, or some provision upon the performance or non-performance of which the commencement of the tenancy depends or its continuance after it has commenced. Covenants are either expressed or implied. When inserted in the lease, they are called express covenants, and are used for the purpose of defining the rights and liabilities of the parties to the lease. All of these matters are considered in subsequent chapters, to which the reader is referred.

[36] Hammond v. Barton, 93 Wis. 183, 67 N. W. 412.

Execution and delivery. A valid lease must be duly executed. By this is meant that it must be properly signed and delivered to the lessee. In some jurisdictions, a seal may also be required. The statutes of the state in which the lease is to operate must be consulted in each case, since if the statutes require certain formalities in the execution of a lease, they must be observed in order to make it valid. Generally, the lease should be signed by both parties, and this may be necessary, in some states, in order to give it validity. On the other hand, in other states, a lease may be executed in duplicate, one being signed by the lessor and the other by the lessee. Some cases, however, hold that though a lease is signed by the lessor only, yet if the tenant enters into the possession of the property under such a lease, he will be bound. It should, however, in every case be signed by the lessor, because until signed by him no tenancy is created and no obligation is imposed.[37] A lease may, of course, be signed by an agent for either of the parties, if such an agent is authorized to sign by the party whom he represents. As a general rule, a seal is not required. This may be otherwise, however, in some jurisdictions by force of statute. Thus, in England, the Real Property Act of 1845 provides that a lease required by law to be in writing shall be void at law unless made by deed. Consequently, in that country, a lease for more than three years from its date must be under seal. Whether or not a seal is required, may depend, then, upon the nature of the written instrument required. For ex-

[37] Laughran v. Smith, 75 N. Y. 205.

ample, a written lease as required by the Statute of Frauds is not the same thing as a "deed." Under the Statute of Frauds a written lease requires no seal, but if a statute requires a lease to be made by a "deed," a seal may be necessary, since at common law a deed is an instrument under seal. In many of our states, however, a deed may be valid without a seal, although this is not true in all of them. For example, in Delaware it is provided by statute that no lease of lands for a longer term than one year is valid, except it be by deed, and under this statute it has been held that where a lease without a seal was given for a term of five years, it was not valid except as a lease from year to year.[38]

A lease must be delivered and must be accepted, the general rule being that it takes effect only upon its delivery. It is not necessary for the purpose of delivery that it should be actually handed over to the lessee, since the intention of the parties governs in such cases, and where the lessor has put it out of his power to recall or to revoke the lease, a delivery will be presumed. Likewise, the acceptance need not be a formal one, but may be implied by the conduct of the lessee.

Recording. The recording of written instruments conveying interests in lands is wholly a matter of statute. As a general rule, no record of a lease is necessary to give it validity between the parties. In order, however, that the lessee may protect his interest from third parties who may either purchase the land or take a mortgage thereon, such third parties

[38] Stewart v. Apel, 5 Houst. 189 (Del.), 4 Houst. 314.

acting in good faith and without any notice of the existing lease, it is important that it should be placed upon record. Generally, a lease need not be acknowledged by the parties in order to make it effective, but under the statutes regulating the recording of instruments, it may have to be acknowledged in order to admit it to record.

Forms of leases. For the purpose of seeing more clearly the contents of a lease and the orderly arrangement of its formal parts, the reader should consult the forms of leases usually given in collections of forms of legal documents. It should be kept in mind, however, that these forms are presented only for the purpose of illustration, since in any particular case the contents of a lease, especially so far as concerns reservations, exceptions, conditions, and covenants, will depend upon the circumstances. A written lease may even consist of letters between the parties.[39]

[39] Baer v. Minock, 128 Mich. 676, 87 N. W. 1045, LEADING ILLUSTRATIVE CASES.

CHAPTER IV.

CONDITIONS, RESERVATIONS AND EXCEPTIONS.

15. **In general.**—As stated in the preceding chapter, leases sometimes contain conditions, reservations, exceptions, and covenants. It is proposed here to take up the consideration of the first three of these terms, leaving covenants for a subsequent chapter.

16. **Definitions.**—As already stated, a condition is a provision upon the performance or non-performance of which the commencement of the tenancy depends or its continuance after it has commenced. It is otherwise defined as a qualification annexed to an estate by the grantor whereby the estate may be created, enlarged, or defeated upon a certain event.[40] Land may be leased subject to a condition to the same extent as a grant of any other estate may be made, and upon the breach of the condition the lessor may terminate the lease and reënter into possession of the land. This is the important difference between a covenant and a condition. A covenant is a contract or an agreement in a lease whereby either party stipulates for the truth of certain facts or binds himself to perform or to do something for the other. Upon the breach of a covenant, however, the injured party has merely his action for damages. In case, however, of breach of a condition subsequent, the landlord, as has been said, may forthwith terminate

[40] Taylor, American Law of Landlord and Tenant, § 271.

the lease and regain possession of the land. Whether a clause in a lease amounts to a condition or only to a covenant will depend upon the intention of the parties as expressed in the lease and as gathered from the entire instrument.[41]

A reservation in a lease, as customarily understood, arises when the lessor reserves some new right to himself out of the property leased. A reservation is never a part of the estate itself, but is something issuing out of it, as for example, a right of way over land reserved by the grantor, or a right to drain water over the land, or any other right which he may create for himself at the time of the making of the lease.

An exception, on the other hand, as already pointed out in the preceding chapter, is something excepted by the lessor out of that which he grants; something he withdraws from the operation of the lease which would otherwise have passed to the lessee under the general terms of the lease.

17. **Kinds of conditions.**—Conditions are said to be either precedent or subsequent. By a condition precedent is meant some condition that must happen or be performed before the lease can take effect. By a condition subsequent is meant a condition upon the failure or non-performance of which the term already entered upon may be defeated. Whether a stipulation is a condition precedent or subsequent depends upon the intention of the parties as gathered from the whole instrument.[42] Where a lessor, for example,

[41] **Howland v. Leach**, 11 Pick. 151 (Mass.).

[42] **Frank v. Stratford-Handcock**, 13 Wyo. 37, 77 Pac. 134. LEADING ILLUSTRATIVE CASES.

agrees to make certain improvements on the premises to be leased by him before the tenant is to take possession, such an agreement is a condition precedent to the commencement of the lease, and the tenant is not obliged to take the premises until the condition has been performed. Again, an agreement that a lease shall not take effect if the lessor should sell the property before the actual beginning of the term, would be another illustration of a condition precedent. On the other hand, a stipulation that intoxicating liquors shall not be sold upon the premises and that if they are sold the lease shall terminate forthwith, would be an example of a condition subsequent. Conditions, either precedent or subsequent, may be waived by the party in whose favor they are made. But when a condition precedent is not waived and yet is not complied with, no estate is created and no relation of landlord and tenant is entered into. When a condition subsequent is broken, the landlord has his right to reënter upon the premises, and to put the tenant out of possession.

18. **How to create.**—No particular words are required in order to create a condition. Such words, however, as "on condition that," "provided that," "if it shall happen," etc., are customarily used, but they are not essential if it can be gathered from the whole instrument that a condition is intended. When a condition subsequent is created, a reëntry clause, as it is called, is generally added, which gives the lessor the right to reënter and take possession of the premises upon the failure of the lessee to comply with the condition. Such a reëntry clause is not nec-

essary, however, in order to create a condition subsequent, if, as said before, the intention to create such a condition is apparent. Instead of a formal reëntry clause, a lease may contain in connection with a condition subsequent a provision that the lease shall terminate in case the lessee fails to comply with the condition.[43] Mere words of restriction do not, however, create a condition, as where a lease contains a provision that the lessee may cut down certain trees for firewood, but that he shall not cut trees in a certain specified place. It has also been held that a stipulation in a lease to the effect that the tenant shall not make any alterations in the buildings leased, without the consent of the owner, does not amount to a condition for the breach of which the tenancy may be terminated.[44] Conditions can be created only at the time that the lease is made, but they may be written in a separate instrument, provided both instruments are delivered at the same time. It is not necessary that a condition should be inserted in the body of the lease, since if written even on the back of the lease at the time the lease is made, it will hold.

19. **Valid conditions.**—The owner of property, since he is not obliged to lease his property at all and since a lease, if made, is his voluntary act, may attach any condition he pleases to a lease, subject to the sole restriction that the condition must be a possible and a legal one. If a condition is impossible or illegal, or contrary to public policy, it will be void, but all

[43] Jackson v. Harrison, 17 Johns. 66 (N. Y.).

[44] As a rule, a stipulation will be considered as a covenant instead of as a condition, if there be no reëntry clause. See § 20.

other conditions are valid and may be enforced. In case, however, of a condition precedent, if the stipulation is impossible at the time when made, or becomes impossible, no estate will vest. But conditions relating to the particular uses of the property, or to payment of rent, or stipulating that the lessee will not do certain acts without the consent of the lessor, are generally valid.

20. **Construed as covenants when.**—Generally, in a lease, stipulations are made in the form of covenants rather than of conditions. Moreover, owing to the harsh rule that a breach of a condition subsequent will either terminate the tenancy or will give the lessor a right to terminate it at his option, the courts do not favor conditions and will if possible construe a clause as a covenant, for the breach of which merely a suit for damages may be maintained, rather than as a condition which would work a forfeiture of the estate.[45] Where, however, a right of reëntry for a breach of an agreement not to assign was added to such a clause, it was held to be a condition and not a covenant.[46] Moreover, where the lease of a building contained the words that it should "be occupied as a grocery store," this was construed as a condition and not as a mere covenant, while, on the other hand, a stipulation that the lessee would surrender the premises to the lessor whenever the lessor desired to make certain improvements on the same, no clause of reëntry being added, was construed as a covenant and not as a condition. Like-

[45] Bergland v. Frawley, 72 Wis. 559, 40 N. W. 372.
[46] Kew v. Trainor, 150 Ill. 150, 37 N. E. 223.

wise, it was held a covenant and not a condition where a lessee agreed to pay as rent a certain portion of the profits of his business, adding that the lessee should furnish the lessor monthly statements, or oftener if desired, of the amount of the business done.

As previously stated, the words "on condition," "provided that," "if it shall happen," etc., are generally used to create a condition, but it should be understood that these words have no magic force and do not in themselves necessarily create a condition. Consequently, when these words or similar words are used, a clause may be construed as a covenant rather than as a condition, if from the entire instrument such seems to be the intention of the parties. On the other hand, the word "covenant" will not necessarily create a covenant where the intention to create a condition is otherwise clear, as, for example, where a right of reëntry is added to what may be called a "covenant" in the lease.

21. **Parties affected.**—The conditions in a lease are binding not only upon the lessee, but also upon a sub-lessee in case of a subletting of the premises. Thus, where a lease contained a condition that "the lessee will not occupy, or in any manner suffer the buildings now on the premises to be occupied for any unlawful purpose," and a sub-tenant of a part of the premises, under the tenant, occupied the same for the unlawful purpose of selling liquor without a license, it was held by the court that the restriction upon the manner of using the premises ran with the land, and was binding upon the estate in the hands of sub-tenants. Such use by a sub-tenant holding under the

original lessee, for an unlawful purpose, will equally forfeit the estate. By creating sub-tenants, the original lessee puts them in possession of the premises, and being thus in possession under him, their acts, if in violation of the conditions of the lease, may cause a forfeiture.

It may be said, therefore, in general, that conditions subsequent, providing for reëntry upon their breach, when expressly declared in a lease, are binding upon all who take under the original lessee's title. Moreover, the fact that the lessee is an infant, or a married woman, will not excuse the failure to comply with a condition.

The only persons who can avoid the lease for a breach of condition subsequent are the lessor, his heirs, or assigns. The lessor cannot reserve this right for some third person, not even by express words. In case, however, the lessor's own estate in the land is an estate for years, his residuary estate passes upon his death to his personal representatives, who act for him in case of a breach of condition by his lessee.

The lessee, himself, cannot violate a condition and, thereupon, take advantage of his own wrongful act by insisting that the lease has terminated by a breach of its condition. The courts will not construe a contract so as to enable a lessee to put an end to it at pleasure by his own improper conduct.

22. **Effect of breach.**—A stipulation that a lease shall terminate or be void upon the lessee's failure to comply with a condition is for the benefit of the lessor, who may waive the forfeiture if he desires, and the lessee will still be bound by his contract. Such a

provision leaves it optional with the lessor whether he will enforce his right or not. The non-compliance with the condition does not make the lease void, but only voidable. Likewise, where a lease provides that the landlord may reënter and take possession of the premises upon the breach of a condition, he is left to his election with regard to his right of reëntry.

At common law, where a landlord had a right of reëntry upon a breach of an express condition that the rent should be regularly paid, it was necessary that he should make a demand of the rent, when it was due, since it was held that there was no breach for a non-payment until the payment had been demanded. Moreover, if no place was specified in the lease where the rent should be paid, the landlord must make his demand upon the land itself. A distinction was also made, at common law, between a lease for life and a lease for a term of years. In the former case, an actual reëntry upon the land by the landlord was necessary to complete a forfeiture. In case, however, of a tenancy for years, no reëntry was necessary. In modern times, a mere notice to quit and a demand of possession may be a sufficient reëntry, and where a suit for ejectment is brought against the tenant, no formal reëntry is required. Some additional matters in connection with reëntry by the landlord will be treated in a subsequent chapter.

23. **Exceptions and reservations.**—Exceptions and reservations have been already defined and distinguished. It should be remembered, however, that the use of the word "excepting" or "reserving," or the use of the two words together, namely, "except-

ing and reserving," will not, in itself, determine whether a true exception or a true reservation is created, since despite the particular word used, the intention of the lessor will govern. Thus, the words, "reserving unto the lessor," etc., may mean that the lessor has kept back a physical part of the thing that is the subject-matter of the lease, and, if so, the word "reserving" will be construed as creating an exception.

A lease is void if it contains an exception of the whole of what has been previously leased; for example, a lease of all of the lessor's lands in a certain place, except certain specified lands, which specified lands are all, in fact, that the lessor has in that place. In any case, an exception is construed against the lessor, and in favor of the lessee.

The reservations most frequently found in leases are rights of way over the leased premises, the right to draw or to take water, to have the use of free running water, to construct drains and sewers, to hunt, to fish, and the right to take fuel from the land. A reservation may operate in favor of the lessor, or of any other person or persons he may designate. When the lease is by parol, the reservation may be by parol also.

CHAPTER V.

COVENANTS.

24. **Definitions and kinds.**—Formerly, at common law, a covenant was defined as a promise under seal. Blackstone defines the term as an agreement in a deed whereby either party stipulates for the truth of certain facts, or binds himself to perform something for the other; or as "a species of express contract contained in a deed to do a desired act or omit one."[47] Where, however, a deed requires no seal, it is unnecessary that a covenant should be under seal, and, for our present purpose, a covenant may be defined as an agreement or stipulation between landlord and tenant, whether such agreement, or stipulation, is under seal or not. As we have previously said, a covenant is different from a condition, and whether a clause in a lease is a condition or a covenant will depend upon the intent of the parties, as gathered from the entire instrument. No particular or technical words are required to create a covenant, since any words that amount to an agreement between the parties are sufficient. Covenants are said to be express or implied. An implied covenant is one that is inferred, or imputed, as a matter of law from the words used. All covenants between lessor and lessee are either implied covenants, or express covenants. For example, the very use of the words "grant and

[47] 2 Blackstone, Commentaries, 304; 3 Blackstone, Commentaries, 155.

demise" implies that the lessee shall have the quiet enjoyment of the premises.

Covenants are also said to be personal and real, or, in other words, covenants that bind only the parties who enter into them, or covenants that are binding upon whosoever may be in possession of the land. These latter covenants are generally known as covenants that "run with the land." For example, a covenant runs with the land when the duty to perform it, or the right to enforce it, passes to the assignee of the land.[48] In the same manner, a covenant runs with the reversion of the land when the duty to perform it, or the right to enforce it, passes to the assignee of the reversion.

25. **Construction of covenants.**—As a rule, covenants should be construed so that the intentions of the parties, as gained from the whole instrument, may be carried into effect. A personal covenant is construed by the law of the state where the covenant is made, while a covenant that runs with the land will be construed by the law of the state in which the land is located. Again, it is a general rule that, in a case of doubt, a covenant will be construed against the covenantor, rather than against the covenantee. Where, however, the words in a covenant may be construed as the words of both parties, they will take effect as such. For example, where a lease contained the following covenant, "the said gangway to be kept open for the benefit of the lot hereby leased, and also of the adjoining lots," it was held that the language of this covenant applied to both parties, and

[48] Ellis v. Bradbury, 75 Cal. 234, 17 Pac. 3.

was binding upon the lessee as well as upon the lessor.[49]

It is another rule in the construction of covenants that a positive stipulation, entered into by the parties, will not be affected by the motives that may be adduced for the making of such a covenant. Although the legal reason for entering into the covenant may have passed away, nevertheless, as a rule, the covenant will still be good.

26. **Breach of covenants.**—As already stated in connection with conditions, there is a material difference between the effect of a breach of condition, and the breach of a covenant. In the former case, the lease may be forfeited, that is, terminated by the landlord; in case of a breach of covenant, however, an action for damages is the proper remedy. In an action for a breach of covenant, it is a good defense, however, that the performance of the agreement has become impossible by causes not within human control, or that the failure of the defendant to perform was caused by the fault of the plaintiff himself, or that the performance of the covenant would be an unlawful act. Although a breach of a covenant gives the injured party the right to an action for damages, yet unless he has received material damage he can recover only a nominal sum. It is not necessary, as a rule, that upon the breach of a covenant the aggrieved party should demand its performance before he brings his action.

27. **Landlord's covenants.**—A landlord may agree, of course, by way of express contract or cov-

[49] Beckwith v. Howard, 6 R. I. 1.

enant between himself and his tenant, to do, or to perform, any lawful thing, in connection with the lease of the premises. The usual express covenants made, however, by a landlord, are covenants for the quiet enjoyment of the premises, against incumbrances, to repair, and to renew the lease. The landlord's implied covenants are for quiet enjoyment, and for the payment of taxes and assessments levied against the property.

Quiet enjoyment. As stated above, the landlord's covenant for quiet enjoyment may be express or implied. In other words, although this covenant is usually expressly inserted in a lease, nevertheless, if not explicitly stated in words, it will be implied from the very fact of the lease itself.[50] By this covenant it is meant that the tenant shall not be turned out of possession of the property, or of any part of it, by any person having a better title than the landlord has, or that the landlord will not do anything that will render the occupation of the premises by his tenant impossible, or unreasonably uncomfortable. The covenant for quiet enjoyment binds, however, only the landlord, and those claiming under him; that is, his heirs and assigns. Consequently, if the tenant is evicted by some person having no title, or by the wrongful act of some third person, not claiming through the landlord, the landlord himself is not responsible.[51] The covenant for quiet enjoyment is one that runs with the land; that is, the duty to comply with it passes to any one to whom the land-

[50] Hamilton v. Wright's Adm'r, 28 Mo. 199.
[51] Tucker v. Du Puy, 210 Pa. St. 461, 60 Atl. 4.

lord may assign his interest. The eviction of the tenant may be either actual or constructive. By actual eviction is meant a physical expulsion of the tenant from the land; by a constructive eviction is meant anything which makes it practically impossible for the tenant to occupy the land, although he may not be bodily ousted from it. For example, where a room was rented to a tenant, and rendered unfit for occupation by reason of escaping gas and smoke that came into the room from other parts of the same building under control of the landlord, it amounted to a constructive eviction of the tenant. Also, where an adjoining tenement was leased by a landlord for an immoral purpose, destroying the peace and quiet of another tenant of his, in another house, it was held that such tenant was constructively evicted. Where, however, a tenant continues to occupy the premises despite such annoying conditions, he will be deemed to have waived a constructive eviction, and will be liable for the rent. If the premises are taken for public purposes by the state, under its right of eminent domain, no eviction by the landlord results, and the tenant must look for his remedy to the state; that is, for just compensation for his property, taken for public purposes.

Incumbrances and taxes. The landlord may expressly covenant that the premises are free from any incumbrances. By this it is meant that no third persons have any rights, or easements in the land, which will interfere with the exclusive possession of it by the tenant. In case, however, no such express covenant is made, the lessee will take the land subject

to such incumbrances as may burden it at the time. There is an implied covenant, however, that the landlord will pay all taxes and assessments levied on the property, and if the landlord should fail to pay them, the lessee may pay the same to prevent his eviction from the premises, and may deduct the amount so paid from his rent.[52] It has also been held that where the landlord did not pay the taxes, and the premises were, in consequence, sold, the tenant could buy the land at the tax sale, and set up his title thus acquired as a defense to the landlord's action for rent.[53] The tenant may expressly covenant, however, to pay the taxes, and by statute in some states it is made his duty to do so.

Repairs. There is no implied covenant that the landlord is under an obligation to make repairs, and in absence of any express contract on his part, he is not obliged to reimburse his tenant for any repairs made by him. The landlord may, however, enter into an express covenant to keep the premises in repair, and, under such an express covenant, it is held that the covenantor agrees to restore the condition of the premises regardless of the cause of the injury or defect, whether by storm, or flood, or fire. In some states, there is a statute requiring the landlord to keep leased premises in reasonable repair in absence of any express agreement to the contrary. Such statutes, however, seem to be confined to buildings intended for dwelling houses.[54] Where, however,

[52] McPherson v. Atlantic & P. R. R. Co., 66 Mo. 103.

[53] Weichselbaum v. Curlett, 20 Kan. 709, 27 Am. Rep. 204.

[54] See White & Co. v. Montgomery, 58 Ga. 204; Torreson v. Walla, 11 N. D. 481, 92 N. W. 834.

a landlord leases different apartments in a building to separate tenants, it is his duty to keep in repair the stairway and other parts of the premises used in common by all the tenants. This question, however, involves the liability of a landlord for injury received by his tenants, or by third persons, owing to defective premises, which is considered in a subsequent chapter.

Condition of premises. As stated in a previous chapter, there is no implied covenant that leased premises are in a tenantable condition.[55] Likewise, there is no implied covenant that the landlord should keep them in such a condition. The tenant must see to it before he takes possession that the premises are inhabitable, or are fit for the purpose for which he intends to use them. But a statement in the lease that the premises are to be used for a certain purpose, may amount to an implied covenant that they are fit for such a use, as, for example, where the lease states that the premises are to be used for a store, or for a boarding house.[56] In the case cited, however, it was held that there was no implied covenant as to the kind, or character, of the boarding house intended.

On the other hand, there is an implied covenant that the leased premises shall be ready for the possession and occupation of the tenant at the time of the beginning of the term. Moreover, where lodgings, or furnished houses, are let, it has been held that

[55] Bennett v. Sullivan, 100 Me. 118, 60 Atl. 886; Daly v. Wise, 132 N. Y. 306, 30 N. E. 837, LEADING ILLUSTRATIVE CASES.

[56] Roosevelt v. Abbatt, 25 N. Y. Supr. 156.

there is an implied covenant that the premises are fit for habitation.[57]

28. **Tenant's covenants.**—While the tenant, the same as the landlord, may enter into any legal contract with reference to the premises, the usual express covenants by tenants are covenants to pay rent, to insure, and not to assign or to sub-let. Among other express covenants by tenants that are frequently inserted in leases, are covenants to surrender the premises in good condition, and covenants concerning the particular use of the premises. Sometimes express covenants to reside on the premises, to make repairs and improvements, and to pay taxes and assessments, are inserted.

Even in the absence of any express covenant, the law implies certain covenants on the tenant's part. These are covenants to pay rent, not to commit waste, to surrender the premises in good condition, to cultivate farm land properly, and, at common law, to repair.

Although, as previously stated, there may be a lease without the reservation of rent, yet, as a rule, the taking possession of leased premises by a tenant implies an agreement on his part to pay a reasonable rent for the same. In case he expressly covenants to pay rent, it is the rule, at common law, that the destruction of the premises will not relieve him from this obligation.[58] However, where a room was rented and the house burned, it was held that the tenant

[57] Ingalls v. Hobbs, 156 Mass. 348, 31 N. E. 286, LEADING ILLUSTRATIVE CASES.

[58] Viterbo v. Friedlander, 120 U. S. 707, 7 S. C. R. 962, 30 L. Ed. 776; Lincoln Trust Co. v. Nathan, 175 Mo. 32, 74 S. W. 1007.

was not bound for the rent, subsequent to the destruction of the house. Express covenants to insure the premises have become very common in modern times, especially in the case of long-time leases. In absence, however, of such an express agreement, there is no implied covenant on the tenant's part to provide for insurance. The distinction between a covenant not to assign, and one not to sub-let has been previously stated, and it will be remembered that an assignment of a lease carries with it the transfer of the entire term, while a sub-letting consists of any part less than the whole. It has also been previously stated that a covenant not to assign is not broken by sub-letting, and, on the other hand, a covenant not to sub-let is not broken by an assignment. The covenant to cultivate farm land properly is an implied one. This means that the tenant is bound to cultivate the farm in a good and husbandlike manner, keeping the fences in repair, and preserving the timber. It is, in fact, a part of the tenant's implied covenant to commit no waste, and to surrender the premises in a good condition, so that they may be delivered over to the landlord at the end of the term uninjured by any willful neglect on the tenant's part.

Express covenants by the tenant, governing the particular use of the premises, are also frequently inserted in modern leases. Such covenants, for example, provide that a building shall be used only for a private dwelling house, or only for residential, and not for business purposes. Such restrictions may, as we have seen, be in the form of a condition, for breach of which a forfeiture may result. If, how-

ever, they are covenants, and not conditions, the landlord's remedy is an action for damages, although, in a proper case, he may also restrain the breach of such a covenant by an injunction. It has been held, however, that where there is a covenant that the landlord may terminate the lease for an objectionable use of the premises, and also that the tenant will pay all damages resulting from any nuisance maintained upon the place, the landlord who leases with full knowledge of the tenant's business cannot restrain, by an injunction, the tenant's use of the property in a way that is incidental to his business, on the ground that it is a nuisance.

CHAPTER VI.

FIXTURES.

29. **Meaning of fixtures.**—In a preceding chapter it was stated, in connection with leases, that a general description of the premises would carry with it all the rights to the use and enjoyment of the property that are naturally incident to it, including fixtures. A fixture may be defined as a chattel that is annexed to the land, and many important questions concerning fixtures may arise in connection with the relationship of landlord and tenant. In earlier times the way and manner in which a chattel was annexed to the land was considered the proper test of determining whether or not the chattel was a fixture.[59] Such is not, however, the rule today. In fact, there is no one single test for determining whether an article, which originally was personal property, has become in fact a part of the realty. The circumstances of each case must be considered. It is a familiar rule of the law of rented property that whatever is affixed to the land goes with the land in a conveyance or lease of the same. It is also a general rule that articles affixed to the land by the tenant during his term cannot be removed by him, and consequently pass to the lessor. It will be seen, therefore, that it may frequently be of great importance to

[59] Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634; Canning v. Owen, 22 R. I. 624, 48 Atl. 1033, LEADING ILLUSTRATIVE CASES.

determine whether, when property is leased, a certain article is a fixture, and, therefore, goes to the tenant with the lease; and also whether an article placed upon the land, or within the buildings, by a tenant, becomes a fixture, and, in consequence, passes to the landlord at the termination of the lease.

30. **Rules for determining fixtures.**—There is great conflict in the cases as to what constitutes fixtures, and as to the rules governing the tests to be used in answering this question. This has been due partly to the confusion in the use of the word fixture, since some of the cases speak of fixtures that can be removed from the land, while other cases use the word fixture in its technical sense, meaning chattels that have become a part of the land, and are, therefore, not removable. The most important rule for the purpose of determining whether certain property is a fixture, or whether it still remains personal property, is the rule of the intention of the parties when placing the article upon the land.

In determining, however, in cases of doubt, what was, in fact, the intention of the parties, resort must be had to certain matters of evidence. These questions may be briefly stated as follows: First, was the intention to make the article a fixture shown by its actual annexation to the realty? Second, what was the immediate object in annexing the article to the realty? Third, was the article adapted for permanent or temporary use? Fourth, can the article be removed without serious damage to the property to which it is annexed? The intention of the parties is to be determined, not by the application of any one

of these rules, but by the united application of them all.[60] The parties may, of course, agree by express contract that a certain article shall be regarded either as a fixture or as personal property, but in the absence of such an agreement, the intention must be generally determined by the answer to the above questions. It should, moreover, be stated that a statute may expressly declare certain subjects of annexation to be fixtures, and others to be personal property.

31. **Character of annexation.**—Despite early opinions to the contrary, the way and manner in which an article is attached to the land carries with it but little weight. As said in a leading case, "The question whether the pyramids of Egypt, or Cleopatra's Needle, are real or personal property does not depend upon the results of an inquiry by the antiquarians whether they were originally made to adhere to their foundations by wafers, or sealing wax, or handfuls of cement."[61] Moreover, as said in another case, "the exact length of the screws or nails is immaterial."[62] An article may be a fixture which merely rests upon the ground by its own weight, and, on the other hand, it may remain personal property. For example, a wooden barn, or a windmill, although erected on a foundation of brick and stone, the foundation being let into the ground, but the erection resting upon it by its weight alone, has been held to be not a fixture. On the other hand, sculptured statues or vases, when made a part of the architec-

[60] Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634; Thomson v. Smith, 111 Iowa 718, 83 N. W. 789, 82 Am. St. Rep. 541.

[61] Snedeker v. Warring, 12 N. Y. 170.

[62] Ward v. Taylor (1901), 1 Ch. 523, C. A.

tural scheme of a house, become fixtures, although resting only by their own weight. The object and purpose for which the article was placed upon the land, or in a building, is more helpful in arriving at the intention of the parties than its mode of annexation. For example, articles may be erected or placed by a tenant on the premises for the purpose of carrying on his trade or business, or nursery stock may be planted in the ground by a lessee. Such articles are called trade fixtures, and are regarded as personal property rather than as part of the realty.

Again, whether the article was adapted to the permanent use and enjoyment of the premises, or only for temporary purposes, may be helpful in determining the question of intention. Questions relating to machinery, engines and boilers installed in mills, fall under this head, such articles being generally held to be fixtures, since they are adapted for the permanent use of the realty. There are, however, many exceptions in such cases, and in particular instances, they may be merely trade fixtures, and therefore to be regarded as personal property. But doors and windows are an essential part of a house, intended for permanent use, and as such must be considered fixtures.

Again, whether an article may be removed from the premises without serious damage to the building or land to which it is affixed, may be an important question. Trifling damage is not to be considered, but where the article cannot be removed without leaving some serious injury to the building or land, it is good evidence, in absence of any agreement to the

contrary, to show that the parties intended to make a permanent annexation.

32. **The relation of the parties.**—In considering the law of fixtures, it is important that the relationship between the parties affected should be determined. For example, questions concerning fixtures may arise between the grantor and the grantee of land; between an heir, or one who takes under a will, and the administrator and executor; between a remainder-man and one who has the life interest in property; and also between landlord and tenant. The rules governing fixtures, especially as to the right to remove from the land articles which are claimed to be personal property by the one desiring to remove them, are not the same in all these different relations. For example, between a vendor and vendee, and a mortgagor and mortgagee, where the question of title is concerned, "land" includes all ground, soil, earth, minerals, lakes, running streams (as so much land covered with water), houses, fences, structures upon the ground, and all vegetable productions, such as trees, herbage, or grasses, standing upon and growing out of the soil.[63] All these things are embraced in the word "land," in the legal sense of that term and, as such, pass with the title, or may be levied upon and sold in an execution against the land. These general rules, however, have been considerably relaxed in favor of tenants. Consequently, for our present purpose, it is important that we consider the special rules regulating fixtures that apply to the relation of landlord and tenant.

[63] Co. Lit. 4; Coombs v. Jordan, 3 Bland 284 (Md.).

33. **Landlord and tenant.**—The general rules as to what constitutes fixtures apply to the relation of landlord and tenant. However, to the general rule that fixtures belong to the owner of the land, certain established exceptions exist in the case of landlord and tenant. These exceptions comprise trade fixtures, fixtures removable by statute, agricultural fixtures, domestic fixtures, and fixtures removable by agreement.

Trade fixtures. Fixtures placed by a tenant on the premises for the purpose of manufacturing, or for carrying on his trade, are treated as personal property during the continuance of his term, and may be removed by him before its conclusion. Thus, a bowling alley placed in a leased room for the purpose of business; buildings and machinery erected upon the land; casings in an oil or gas well; counters and shelves, although attached to the floor by nails; glass cases for the display of goods; bar fixtures, cupboards and racks; boilers and engines; and many other articles employed in business or trade, would fall under the general designation of trade fixtures.

Different reasons have been given by courts for these exceptions to the general class of fixtures, one being that they are not presumed to have been annexed to the land with the intention of making them fixtures, since they are destined only for a temporary use. A better reason, however, seems to be that it is an indulgence shown by the law, not arising from any regard as to intention, but by way of an exception to a rule which would otherwise be likely

to work hardship, or which might impede the promotion of trade.[64]

Fixtures removable by statute. The right of a tenant to remove fixtures is regulated in some states by statutes. For example, the law of Idaho provides that a tenant may remove from the premises, at any time during the continuance of his term, anything affixed thereto for the purpose of trade, manufacturing, ornament, or domestic use, if the removal can be made without injury to the premises, unless the article has, by the manner in which it is affixed, become an integral part of the premises.[65]

Agricultural and domestic fixtures. Agricultural and domestic fixtures may also be removed by a tenant. Agricultural fixtures include buildings erected by a tenant during his term for agricultural purposes, as, for example, sheds, stables, store-rooms, barns, and cider presses; they may include nursery stock, and also, when not intended for repairs upon the premises, posts, boards, and poles. Manure, however, made upon a leased farm, goes with the land and belongs to the lessor. Under the term domestic fixtures are included articles of a useful and ornamental character that have been added to premises for its more convenient use.[66] For example, an apparatus for generating gas, a range, and a fire-screen affixed in a fire-place, have been held removable by a tenant under the designation of domestic fixtures.

[64] Treadway v. Sharon, 7 Nev. 37.

[65] Idaho Civil Code, § 2385. Similar statutes are to be found in other states.

[66] Hayford v. Wentworth, 97 Me. 347, 54 Atl. 940.

Articles removable by agreement. By agreement between the landlord and his tenant, made either in writing or by parol, articles, although they are annexed to the land or to a building, may be removed by the tenant as his personal property.[67] Such agreements may extend to any class of articles not included within the foregoing exceptions to the general rules.

Conditions of removal. It is a general rule that where a tenant is permitted to remove fixtures, he must do so before the expiration of his lease.[68] Should he fail to do so, they become technical fixtures, and as such the property of the landlord. Likewise, where a tenant continues in possession of the premises after the expiration of his former lease and under a new lease, he loses his right to remove what he could have removed under the prior lease, unless he has reserved the right to do so.[69] In case, however, a tenant is a tenant at will, he may remove his fixtures within a reasonable time after the tenancy has been terminated by notice. Where, however, by express agreement, property, although affixed to the premises, has been made personal property, the rule as to removal during the continuance of the term does not apply.[70] What is a reasonable time for the removal of fixtures will depend upon the circumstances of each case. It has been held, however, that six weeks after the expiration of a lease is an unrea-

[67] Tyson v. Post, 108 N. Y. 217, 15 N. E. 316, 2 Am. St. Rep. 409.

[68] Mueller v. C. M. & St. P. Ry. Co., 111 Wis. 300, 87 N. W. 239, LEADING ILLUSTRATIVE CASES.

[69] Sanitary District of Chicago v. Cook, 169 Ill. 184, 48 N. E. 461, 61 Am. St. Rep. 161, 39 L. R. A. 369; Wright v. Macdonell (Tex. Civ. App.), 27 S. W. 1024. But see Royce v. Latshaw, 15 Colo. App. 420, 62 Pac. 627.

[70] Lake Superior, etc., Co. v. McCann, 86 Mich. 106, 48 N. W. 692.

sonable time for the beginning of the removal of a house, built by tenant upon leased land, such house having been erected by him as a trade fixture. A tenant must remove his fixtures without serious injury to the premises, and where this cannot be done, they will be held permanent attachments to the realty, and not removable as trade fixtures. In all cases, what is a reasonable time, and whether or not articles can be seized and removed without material injury to the land, are questions of fact for the jury.

CHAPTER VII.

THE LANDLORD'S RIGHTS, DUTIES AND LIABILITIES.

34. **In general.**—The rights, duties, and liabilities of a landlord are governed either by covenants, which, as we have seen, may be either express or implied, or they arise as a matter of common law independent of any covenant. In a preceding chapter, we have seen that by means of covenants the parties may bind themselves to the performance of almost any duty, and their rights and liabilities in connection with covenants have been considered, under both express and implied covenants. It remains for us in this chapter to deal with the landlord's rights, duties, and liabilities in general, particularly as they arise independent of covenants.

35. **Right to protect his interest.**—Regardless of any contract between the parties to such an effect, the landlord has a right to protect his interest in the leased premises. We have already seen that the relationship between landlord and tenant necessarily implies that some interest in the property remains in the landlord, and that this remaining interest is known as the landlord's reversion. For the purpose of protecting his interest, the landlord may maintain actions against all persons doing permanent injury to the property. For an injury to the tenant's possession, which, however, does not affect the landlord's interest, the landlord cannot sue. Although, where

the wrong is of such a nature that it affects the permanent value of the property, the landlord may sue either the tenant or a third person who is responsible for the damage. Actions against a tenant, however, for permanent injury to the property are so bound up with the tenant's duty to take reasonable care of the premises that they can be considered more conveniently under the tenant's rights, duties and liabilities, as treated in a subsequent chapter. In general, therefore, a landlord may have an action for damages against his tenant for injuries already committed by him, and may also restrain his tenant by injunction from the further commission of such wrongs.[71] For injuries to the reversion committed by a third person, the landlord may sue, although his tenant is still in possession. Illustrations of such injuries are the cutting or burning of timber, the flooding of land, or the removal or destruction of buildings and fences.

36. **Right to assign reversion or lease.**—The owner of rented property may sell it even when the tenant is in possession. The purchaser, however, takes the property subject to the lease. The landlord remains liable, nevertheless, for any personal covenants he may have entered into with his tenant, and covenants that run with the land will not be defeated by the sale. The landlord has also a right to assign the lease. In case of an assignment of the lease, notice should be given to the tenant, and it will be the tenant's duty henceforth to pay the rent to the landlord's assignee, since the assignment of the lease

[71] Davenport v. Magoon, 13 Oreg. 3, 4 Pac. 299, 57 Am. Rep. 1.

by the landlord created the relation of landlord and tenant between the assignee and the tenant. The assignment of the lease does not, however, affect the tenant's rights, and no greater rent can be collected during the term than by the former landlord.

37. **Remedies for rent.**—The landlord's right to the periodic payment of the rent, and his liens and remedies for the same, in case it is not paid when due, are made the subject of a subsequent chapter, to which the reader is referred.

38. **Liability for injuries.**—We have already seen that in absence of a covenant, or of some statute which regulates the matter, a landlord is not under any duty to the tenant to make repairs upon the leased premises. Due, however, to the dangerous or defective condition of the property, injuries may be received by the tenant or by third persons, and questions consequently frequently arise concerning the landlord's liability in such cases.

Injuries to tenants. Although the landlord is under no duty to repair, nevertheless, if he rents premises which contain defects not known to, or apparent to, the tenant, but known to the landlord, and which the landlord conceals from the tenant, the landlord will be liable for any injury received by his tenant in consequence of such latent defects.[72] Also where a landlord rents premises which are used by different and independent tenants, but retains within his own control certain parts of the premises for

[72] Maywood v. Logan, 78 Mich. 135, 43 N. W. 1052, 18 Am. St. Rep. 431. See Borggard v. Gale, 205 Ill. 511, 68 N. E. 1063, LEADING ILLUSTRATIVE CASES.

the common use of all the tenants, it is his duty in such cases to keep the parts retained by him in safe condition, and for injuries received by his tenants, due to the landlord's neglect to perform this duty, he will be responsible. Moreover, although the landlord is under no obligation to make repairs, yet where he does in fact make repairs, he will be liable for injuries received by his tenants resulting either from his own negligence or from the negligence of those in his employ during the progress of the repairs. Injuries received by a servant or by a guest of the tenant, or by a sub-tenant, where the tenant has a right to sub-let or to assign his term, fall within the same rules as injuries received by the tenant himself. In other words, such persons will have an action for damages for injuries received, to the same extent as the tenant himself has. In any such action for damages, however, the landlord may show in defense the contributory negligence of the injured party. Likewise, where a tenant has knowledge of the dangerous or defective condition of the premises, but continues to occupy the same, it is strong evidence of his assumption of the risk, and if he is subsequently injured by reason of such defect, he will generally be unable to recover because of such contributory negligence on his part.[73]

Injuries to third persons. With reference to injuries received upon leased premises by third persons, resulting from the dangerous or defective condition of the property, the general rule is that the landlord is not liable, unless, by some invitation on

[73] Davidson v. Fischer, 11 Colo. 583, 19 Pac. 652, 7 Am. St. Rep. 267.

his part, either express or implied, he has induced such third person to come upon the place. Where, however, a landlord retains control of a portion of the premises, he is bound to exercise due care in keeping the same in a reasonably safe condition, for the use of all who enter it in the course of ordinary business transactions. A distinction is also made between the dangerous condition of the property at the time of the lease, and its dangerous condition originating after the lease is made, and possession taken by the tenant, the landlord being liable for injuries received by third persons in the first case, and not in the second. Likewise, where the landlord is making repairs upon the premises, even though he is under no duty to make such repairs, yet for the negligence of himself, or of his servants, whereby third persons are injured, he may be liable. Some cases, moreover, hold that where a landlord agrees with his tenant to make repairs, and neglects to do so, the landlord will be liable to third persons for injuries received by them from any continuing defects.[74] For injuries, however, received by third persons, owing to the negligence of the tenant, or to the misuse of the premises by the tenant, without the landlord's consent, the landlord will not be liable.[75] To trespassers upon the premises, or to persons who go thereon without invitation, express or implied, on the part of the landlord, he is under no obligation, and if they receive injuries upon the place while there without lawful authority, they cannot recover damages from him.

[74] Boyce v. Snow, 187 Ill. 181, 58 N. E. 403.
[75] Martin v. Pettit, 117 N. Y. 118, 22 N. E. 566, 5 L. R. A. 794.

Defective sidewalks; snow and ice. For injuries received from defective conditions in a sidewalk or in the approaches to leased property, the landlord, as a general rule, is not liable, since it is the general duty of the tenant, and not of the landlord, to keep such places in a safe condition. Accordingly, where a passer-by fell into an open coalhole in the sidewalk in front of leased premises, the landlord was held not to be liable, because he was not in possession of the property at the time of the accident.[76] Agreeable, however, to the rule laid down in the preceding paragraph, it was held in another case that where a coal opening in the sidewalk was in a dangerous condition at the time of the lease, and a person was injured by falling into it, the landlord was liable.[77] On the other hand, a statute may impose upon the landlord the duty of keeping a sidewalk in repair, and in a reasonably safe condition. In such a case, the landlord may be held liable for injuries received by passers-by from its defective condition. But where a passer-by is injured by some part of a leased building which becomes detached and falls upon him, as, for example, a slate from the roof or a cap-stone in its walls, the landlord will not be liable unless the defect in the building existed at the time of the lease.

A landlord is under no duty to his tenant to remove snow and ice from a sidewalk. Consequently, the owner of the building would not be liable to his tenant for injuries received by him from such a cause. Likewise as to third persons: if ice upon the side-

[76] Fisher v. Thirkell, 21 Mich. 1.
[77] Dalay v. Savage, 145 Mass. 38, 12 N. E. 841.

walk is a nuisance to the passing public, endangering their lives and limbs, and if it is a nuisance arising during the continuance of the lease, it is a thing temporary in its nature, a defect that the tenant is called upon to remedy, and not the landlord.[78] As to injuries received from the fall of snow and ice accumulated upon a house-top, the landlord is likewise not liable for injuries to a passer-by, where the snow and ice was accumulated during the tenancy. The rule is different, however, where the roof is under the control and in the possession of the landlord.

Fire escapes. At common law, a landlord is not obliged to furnish fire escapes to buildings leased by him, but, by force of statute in some states, it is made the duty of the owner of certain places, or buildings, especially factories and work-shops, to provide such convenient escapes from the upper stories of such buildings. It may also be made the duty of the owner to keep such escapes in safe condition. Under such statutes, the owner may be liable to a criminal prosecution for his failure to observe the law, and also liable in an action for damages for death or injuries caused by his negligence. Under such statutes, it would be the duty of a landlord to keep a fire escape in repair, although he would be under no obligation to keep the premises generally in repair. However, under such statutes, it is the landlord's duty to keep such appliances safe only for the purposes for which they are intended by the law. Consequently, where a child, playing upon a fire escape, was a mere trespasser, and had no right there at the

[78] Purcell v. English, 86 Ind. 34, 44 Am. Rep. 255.

time, the landlord was not liable for injuries received by such child, due to the unsafe condition of the platform.[79]

39. **Right to repair and improve.**—It has already been stated that, in absence of any agreement, or of a statute requiring repairs to be made, the landlord is not obliged to keep leased premises in repair. It is also held that where the landlord is under no duty to make repairs, he has no right to enter upon the leased premises to make repairs, even such as seem necessary to him, unless he has reserved in the lease a right to enter for such a purpose.[80] Moreover, where a landlord has agreed to make repairs, or has reserved the right to enter for the purpose of making repairs, he cannot under such a right disturb his tenant in the quiet possession of the premises, beyond what is absolutely necessary to restore the property to the condition in which it was at the time the lease was made.

The rule as to improvements is the same as that regulating repairs. A landlord may agree with his tenant to make improvements upon the premises, but in the absence of such an agreement, he is, of course, under no obligation to do so.

In the absence of an agreement between the parties, or of some statute giving the right, a landlord has, in general, no right, as landlord, to enter upon the premises leased by him to a tenant, except for the sole purpose of preventing waste, or for the purpose

[79] McAlpin v. Powell, 70 N. Y. 126.

[80] Goebel v. Hough, 26 Minn. 252, 2 N. W. 847. See Darlington v. De Wald, 194 Pa. St. 305, 45 Atl. 57, LEADING ILLUSTRATIVE CASES.

of protecting himself from liability for actions based upon his negligence.

40. **Right to fixtures.**—Articles affixed by a tenant to the realty become, as a general rule, a part of the premises, and belong, therefore, to the landlord. To this general rule there are, however, certain well established exceptions, such as trade, agricultural, and domestic fixtures which have already been considered in a preceding chapter. Unless the tenant has the right, by some such special rule of law, to remove fixtures, the right of the landlord to them is well settled.

CHAPTER VIII.

THE TENANT'S RIGHTS, DUTIES, AND LIABILITIES.

41. **In general.**—We have seen that a tenant, by covenant, or contract, made with his landlord, may stipulate for such rights or be bound by such duties as the parties may agree. It has also been pointed out that the very fact that one is a tenant binds him to certain implied covenants, namely, to pay rent, to cultivate farm lands in a husbandlike manner, not to commit waste, to surrender the premises in good condition, and, at common law, to repair.[81] We desire, in this chapter, to consider some of these points more at length, particularly the rights, duties, and liabilities of a tenant independent of covenants.

42. **Right to possession.**—At common law the right of possession of the leased premises remains in the landlord even after the making of the lease, it being necessary for the tenant to enter upon the premises before his legal right of possession begins. At the present time, however, it is the general rule that it is not necessary for a tenant to enter, and to take formal possession of the premises, before his right of possession begins, since, by the great weight of authority, his right of possession will date from the making of the lease, unless the lease contains a stipulation to the contrary.[82] In case a lease is given for a

[81] See chapter on COVENANTS.

[82] Moore v. Guardian Trust Co., 173 Mo. 218, 73 S. W. 143.

term to commence in the future, the tenant's right of possession will date, however, not from the time of the making of the lease, but from the time that the lease is to go into effect. Under the old rule, a tenant could not sub-let to another tenant unless the first tenant had entered and taken possession of the property, since, otherwise, he had no possession to deliver to the sub-tenant. At the present time, however, where the lease contains nothing to the contrary, a person who has leased premises from a landlord may sub-let them to another person, although the first tenant has never entered upon and taken possession of the premises. Sometimes a lease contains an express covenant on the part of the landlord that he will put the tenant in possession of the property, and some courts, following the English doctrine, hold that when the tenant is entitled to possession, if there is any obstacle to his entry, whether caused by the landlord or by some third person, the landlord is liable.[83] The general rule in this country, however, seems to be that the landlord performs his full duty with reference to the tenant's possession if he himself (that is, the landlord) does nothing to prevent the entry of the tenant; in other words, that the landlord is not responsible if the tenant's entry is opposed by persons not claiming under the landlord. In all cases, where the tenant has the right of possession, he may bring an action of ejectment against either his landlord or any third person who may be withholding from him the lawful possession of the property.

Injuries to possession. We have seen in a previous

[83] Cohn v. Norton, 57 Conn. 480, 18 Atl. 595, 5 L. R. A. 572.

chapter that for permanent injury to the premises the landlord has a right of action. For an injury, however, that disturbs the tenant's right of possession, an action may be maintained by the tenant himself, and where the injury affects only the possession, and not the permanent value of the property, the tenant has the sole right of action. When, however, an injury disturbs both the possession and also the landlord's right in the property, the tenant may sue the wrongdoer for the injury done to his possession, and the landlord may also sue him for the wrong done to the landlord's interest. A tenant may even sue his landlord, in case the landlord trespasses upon the property and disturbs his tenant in his right of possession.[84] A tenant has also the right to protect his possession against injury caused by nuisances, and he may, by means of injunction, protect his rights by restraining the maintenance of a nuisance which affects his health or his comfort, or the reasonable use and enjoyment of his leased premises. The amount of damages that a tenant may recover for an injury to his right of use and occupation of the property will generally be the amount of the depreciation in the rental value of the property from the time of the injury even unto the end of the term, if the injury continues thus long.

Eviction from possession. A tenant may be evicted from his possession of leased premises either by some act on the part of his landlord or by some third person, and evictions, as already pointed out, may be either actual or constructive. A mere trespass, how-

[84] Shaft v. Carey, 107 Wis. 273, 83 N. W. 288.

ever, will not amount to an eviction, since to constitute an eviction there must be some act which substantially deprives the tenant of the entire use of the whole or a part of the premises.[85] When a tenant has been evicted by some person, whether by his landlord or by some other person, he has his right to an action for damages. In a proper case he may bring an action in ejectment, or any other action that the statutes may provide. In such cases, the amount that a tenant may recover in an action for damages will generally be the actual loss which the tenant has sustained, including, in a lease of business premises, injury to a tenant's business, or to his stock in trade.[86]

43. **Cannot deny landlord's title.**—One of the tenant's implied obligations is that he cannot, during the continuance of the lease, deny his landlord's title to the premises.[87] The tenant is said to be estopped to deny the validity of his landlord's claim or title to the land. No matter how questionable the landlord's title may be, any tenant who goes into possession of property under a lease cannot question the title. Should a tenant, for any reason, desire to deny his landlord's right to the land, he must first surrender to his landlord the possession of the premises. While, however, he remains a tenant, it is his legal duty to acknowledge the title of him from whom he obtained his lease. Even where a tenant goes into

[85] Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322.

[86] Chapman v. Kirby, 49 Ill. 211.

[87] Davis v. Williams, 130 Ala. 530, 30 So. 488, 54 L. R. A. 749, 89 Am. St. Rep. 55, LEADING ILLUSTRATIVE CASES; Nicrosi v. Phillipi, 91 Ala. 299, 8 So. 561, LEADING ILLUSTRATIVE CASES.

possession under a lease that may be void, nevertheless, when in possession under such lease, he is bound by this rule of estoppel. Where, however, a tenant has been induced by fraud, or misrepresentation, on the part of his landlord, to enter into the relation of landlord and tenant, the doctrine of estoppel does not apply. The doctrine does apply, however, to tenancy by sufferance or at will, and likewise to tenants who hold over after the expiration of their terms. The rule also applies to persons claiming under a tenant, as, for example, to his sub-tenant and assignee, and, although the landlord may have transferred or assigned his rights to another, a tenant, or those claiming under him, will be estopped to deny the title of those claiming under the landlord. Moreover, in case of the landlord's death, if the tenant continues in possession of the leased premises, he will be estopped to deny the title that the landlord's heirs, or executors, or administrators, may claim to have derived from the landlord.[88]

44. **Use and enjoyment of premises.**—A tenant is entitled to all the easements and privileges that lawfully belong to the use and enjoyment of the leased premises. He must, however, treat the premises in such a way that no material injury, except such as results from the reasonable wear and tear of the property, shall be done to them. A tenant cannot, moreover, put the leased premises to any use not intended by the lease. We have also seen that the lease itself may contain conditions or restrictions as to the way and manner in which the premises shall

[88] Blantin v. Whitaker, 11 Humph. 313 (Tenn.).

be used, and, in connection with implied covenants, it was stated that there was an implied obligation on the part of the tenant not to commit waste. Waste may be defined as spoiling, injury, or destruction of the premises, either of buildings, woods, or land, or, in fact, of anything pertaining to the permanent use and enjoyment of the property, which will affect or prejudice the rights of the landlord. In other words, waste is a permanent injury to the landlord's right of reversion. A tenant must not only commit no waste himself, but he must not permit or allow another to do so, since he will be responsible not only for permanent injuries caused by himself, but also for those permitted by him on the leased premises.

Waste may result from positive acts of destruction or from a tenant's neglect or omission to do what may be reasonably necessary to prevent a permanent injury to the property. The question of waste frequently arises in connection with the question of repairs. This, however, depends upon the tenant's duty to make repairs, which is discussed in a subsequent paragraph. In the case of farm lands, it is the tenant's duty to see that the land is tilled in a good and husbandlike manner. His failure or neglect to do this may consequently amount to waste. Where, however, farm lands are rented under no agreement, either express or implied, that they shall be tilled, it would not be waste to leave the land uncultivated. Waste may, in general, be illustrated by the tearing down of buildings, by the destruction of fences and walls, shrubbery and ornamental trees, by change or alterations in the interior of buildings without the

consent of the landlord, by the unwarranted cutting of standing timber for the purposes of sale, or by the removal of ore or coal from mines without the permission of the owner. A distinction, however, is made, in some of the cases, between the opening of a new mine and the working of a mine opened before the tenancy began. Under the old common law, it was waste for the tenant to open a new mine, but he could operate those which were opened at the time of his entry into possession.

Emblements and estovers. By the common law, a tenant is entitled to estovers, but is not entitled to emblements. The word estovers means necessary support or maintenance, and, as applied to land, it means the right to take from the land necessary wood or other material for the repair of fences and buildings, or for agricultural purposes, also for fuel.[89] The doctrine of estovers, however, is not of as much importance today as it was in ancient times.

By emblements is generally meant crops growing upon the land, that is, crops raised annually, and produced by the labor of man. The word includes grain and vegetables of all kinds produced by industry. In the law of landlord and tenant, the word emblements has a special meaning, namely: the crops left growing on the premises by an outgoing tenant. As long as a tenant is in possession of leased premises, he is entitled, of course, to emblements, using the word in its general meaning. Where, however, a tenant plants a crop, knowing that his term will end before the crop matures, he has no right, after he has

[89] Anderson v. Cowan, 125 Iowa 259, 101 N. W. 92

yielded possession of the land to his landlord, to enter at some subsequent period and gather the crop. As has been said, it is his own folly to sow when he knows that his term will not continue sufficiently long for him to reap. This rule applies, however, only to cases where the end of the term is certain. Where a tenancy is ended without the tenant's fault, he will be entitled to the crops already sown.[90] Accordingly, in some of the books and cases, the word emblements, in the law of landlord and tenant, means the right of a tenant to take from the soil the crops that he has planted, where his tenancy was terminated by some unforeseen contingency. Thus, crops planted during a tenancy at will belong to the tenant where the landlord terminates the lease before the crops are matured.[91] Also, where a tenant for life dies between the planting and the reaping of a crop, his personal representatives are entitled to the emblements. In some states, it is held that by custom a tenant is entitled to reap a crop sown by him, although it does not mature until after the expiration of a lease for a fixed term. A distinction, however, is made in some of these cases between the time when the crop was planted; for example, if a tenant, whose lease expires in the spring, sows in the fall, he is entitled, according to these cases, to the crop maturing in the spring, although such maturity is not until after the termination of his lease. Where, however, a tenant does not sow until spring, he is not entitled to the crop

[90] Morgan v. Morgan, 65 Ga. 493; Harris v. Carson, 7 Leigh 632 (Va.), 30 Am. Dec. 510.

[91] Plummer v. Currier, 52 N. H. 287, 296.

when grown, if his lease is to terminate soon after the crop is sown.[92]

45. **Repairs.**—As already shown in a preceding chapter, a landlord is under no obligation, in the absence of some statute, or an agreement with his tenant, to the contrary, to make ordinary repairs upon the leased premises. In fact, as stated in connection with implied covenants, this duty is imposed upon the tenant himself. At common law, the duty of the tenant to make repairs is closely connected with his duty not to commit or to permit any waste. Under the common law rule, a tenant's duty to repair is, however, only a duty to keep the buildings wind- and water-tight; to keep fences in good order; and to replace doors and windows that are broken during his term. But a tenant is not responsible for ordinary wear and tear, nor is it his duty to rebuild premises that have been blown or burnt down. Moreover, his common law duty to repair does not include substantial repairs, as, for example, putting a new roof on a building. Nor is it his duty to paint, or to whitewash, or to paper, the buildings or their rooms. Under no circumstances is it his duty, in absence of express agreement, to improve the premises, or to leave them in a better condition than they were in when delivered to him. Where a tenant voluntarily makes repairs not included in his common law duty, he cannot, however, recover from his landlord the cost of such repairs. Neither can he deduct such cost from the payment of his rent. Custom and usage may affect the tenant's common law duty to

[92] Biggs v. Brown, 2 S. & R. 14 (Pa.).

make minor repairs, and, where it is the established practice of the owner of buildings, who rents them, to undertake repairs on his own account, a tenant may be relieved even from his common law duty to keep the premises wind- and water-tight.

46. **Sub-letting and assigning.**—The right of a tenant to sub-let, or to assign, his term has already been referred to in several connections. Consequently, it will be sufficient to repeat here that a tenant, unless he has bound himself to the contrary by a covenant, may either sub-let or assign his term. The difference between sub-letting and assigning has also been previously explained; namely, a sub-letting is a lease for a term shorter than the tenant's own term, while an assignment is a transfer, from the tenant to another, of the tenant's entire term. We have also seen, in connection with covenants, that a covenant not to assign will not be broken by a sub-letting, and that a covenant not to sub-let will not be broken by an assignment. In most leases, however, the rights of the tenant, with reference to sub-letting and assigning, are governed by the agreement of the parties. Moreover, in some states, by force of statute, a tenant cannot sub-let or assign, even in the absence of an express covenant to that effect, without the permission of his landlord.

47. **Liability for injuries.**—Liability for injuries received by persons on leased premises has already been partially discussed, in the preceding chapter, in connection with the landlord's liability. Where, however, injuries are received by persons owing to the failure or neglect of a tenant to keep the property in

a reasonably safe condition, when it is his duty to do so, the tenant himself will be liable to an action for damages. The distinction between the landlord's liability and the tenant's liability, with reference to the condition of the premises before and after the tenant's term began, has already been pointed out. Accordingly, where a tenant negligently leaves open a coalhole in the sidewalk, so that a person walking in the street falls through and is injured, the tenant himself will be responsible. Also where a tenant undertakes to repair the premises, he will be responsible for injuries inflicted upon other persons, by reason of either his own neglect or the neglect of persons in his employ, during the making of the repairs.

A tenant who keeps dangerous animals upon his premises keeps them there at his own peril. They are, in themselves, a nuisance, and the tenant will be liable for any injuries caused by them. Moreover, as a general rule, regardless of all questions between the landlord and tenant as to whose duty it is to repair, a tenant who is in the possession of premises owes a duty to all persons whom he invites upon the premises, or to those whom he induces to come there, or to those who resort there for the purposes of business, to keep the premises in a reasonably safe condition.[93] For injuries received by such third persons, due to the unsafe condition of the premises, the tenant will be liable.

48. **Fixtures.**—The right of a tenant to remove from the leased premises certain kinds of property,

[93] Hussey v. Ryan, 64 Md. 426, 2 Atl. 729, 54 Am. Rep. 772.

known as domestic, trade, and agricultural fixtures, has already been considered in a previous chapter.

49. **Rent.**—The most important duty imposed upon a tenant is his duty to pay rent. Originally, the term "rent" had a technical meaning, being something which a tenant renders (returns) out of the profits of the land which he enjoys. In modern times it is a compensation paid for the use of land. It is, of course, usually money, although by agreement it may be something else. The matter of rent involves so many details that it is made the subject of a special subsequent chapter.

CHAPTER IX.

RENT.

50. **Tenant's duty to pay.**—The paramount duty of a tenant is the payment of rent. The amount of rent is generally fixed by the terms of the lease, but, in the absence of any express agreement as to the amount, it is the tenant's legal duty to pay what the premises are reasonably worth. While rent is generally payable in money, yet it may be, by agreement between the parties, paid in any other thing of value; for example, services, or crops, or goods in general. The tenant's duty to pay rent does not depend upon his actual occupation of the premises. Thus, where a tenant has the legal possession of property, with full right to enter there, and to enjoy the same, he is under obligation to pay the stipulated rent, whether he actually takes possession of the premises or not. For example, where one leased a building for several years, occupied it for one year, then locked the door and went away, retaining possession of the premises, but not occupying the same, he was held liable for the rent for the entire term.[94] Likewise, where a lease is renewed, a tenant is liable for the rent, whether he occupies the premises or not. As pointed out in an earlier chapter, the relation of landlord and tenant may exist without the reservation of a rent, but this

[94] Hall v. Western Transp. Co., 34 N. Y. 284.

occurs only in special and unusual cases, and by the express agreement of the parties.

51. **Who is liable for rent.**—Generally speaking, only the tenant is liable for the payment of rent. A third person, however, in consideration for the executing of a lease in favor of another person, may make himself personally liable to pay the rent. In case a tenant is an infant, while, as we have seen, he may avoid his lease, yet so long as he remains in possession, he must pay a reasonable rent, just as he must pay for other necessities. In case of the death of a tenant, the obligation to pay the rent under his lease will fall upon his personal representatives. If a lease of property is made to two or more persons jointly, any one of them will be liable for the entire rent.[95] Where, however, one takes the lease as the agent of some other person, the fact of such agency being known to the landlord, the principal, and not the agent, will be responsible for the rent. In case of a sub-letting, or an assignment, of the leased premises by the tenant, he will still be liable for the rent, unless the landlord agrees to accept the new tenant in place of the old, and to relieve the latter from all further responsibility. The mere fact, however, that a landlord accepts rent from a sub-tenant, or from an assignee, without having released the original tenant, will not relieve such original tenant from his duty to pay.

In case a lease is assigned, and the assignee goes into possession of the premises, a privity of estate is created between the assignee and the original land-

[95] Ding v. Kennedy, 7 Colo. App. 72, 41 Pac. 1112.

lord, and the assignee becomes liable to the original landlord for the rent reserved in the lease. This is so because a covenant to pay rent is a covenant that runs with the land, and the assignee in possession of the land will be bound by the covenant. This rule, however, does not apply to a sub-tenant of the original tenant. A sub-tenant incurs no responsibility to the landlord of the first tenant, unless, as in some states, a statute makes him liable.[96]

52. **Rent payable to whom.**—As a general rule, rent is payable only to the landlord, or to an agent authorized by the landlord to receive the rent. In case two or more persons as partners rent property to a tenant, the rent may be lawfully paid to any one of the partners. Where the leased premises are sold by the landlord, future rents are payable to the purchaser of the property, but rents already due before the sale was made are payable to the former owner. Proper notice of a sale of the premises by the landlord should, however, be given to a tenant; otherwise, a tenant who continues to pay rent to his original landlord, after the sale is made, will be protected against claims for rent by the purchaser.[97] Instead of selling the property outright, a landlord may assign the rent to some third person, and in case of notice of such assignment to the tenant, it will be his duty to pay rent thereafter to the assignee. But even when the entire property is sold by the landlord, he may covenant in the deed of sale that the rent for

[96] Giddings v. Felker, 70 Tex. 176, 7 S. W. 694. As to a sub-tenant's statutory liability to the landlord, see St. Joseph, etc., R. R. Co., v. St. Louis, etc., R. R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607.

[97] O'Connor v. Kelly, 41 Cal. 432.

an unexpired term shall be still payable to him, in which case it will be the duty of the tenant to continue the payment of rent to his original landlord. In case of a landlord's death, all unpaid rents are due to his heirs or to his personal representatives.

53. **Time and mode of payment.**—The lease generally fixes the time when the rent is to be paid. In case of a yearly rent, the rent, at common law, in absence of an agreement to the contrary, is not payable until the end of the year. The lease, however, may provide that the rent shall be paid quarterly, or monthly. In ordinary cases, where dwelling houses are leased, the rent, either by agreement or by custom, is payable each month. The parties may, however, by contract, agree upon any time for the payment of the rent. In case the rent is made payable on a certain day, the tenant has the whole of the day in which to pay his rent, and it has been held that he will not be in arrears until after midnight of that day.[98] Rent is regularly payable in cash. It may, however, be paid by check, with the consent of the landlord. If, however, the check should be dishonored at the bank, especially if presented within a reasonable time, the tenant will still be liable to the landlord for the amount of the check. Should a landlord accept a promissory note for rent due and unpaid, the note will not constitute a payment, unless so agreed by the landlord, until it has been actually paid.

Whether in advance. A landlord may stipulate that

[98] Dibble v. Bowater, 2 E. & B. 564 (Eng., Q. B.). SUNDAY. Rent falling due on Sunday may lawfully be paid on that day. It will, therefore, if not paid, be in arrears on Monday. Child v. Edwards (1909), 2 K. B. 753 (Eng.).

rents shall be payable in advance, and it may be made a condition precedent to the possession of the premises by the tenant. The agreement as to advance payments may be for the entire term, or the contract may provide that the rent shall be paid for stated periods, for example, monthly or quarterly in advance. Although the first payment has been made in advance by the tenant, and he has gone into possession by virtue of such payment, the lease may nevertheless contain a provision that the tenancy shall terminate and be forfeited in case the tenant, upon any future rental day, fails to pay his rent in advance as agreed. Where payment for rent has been made in advance, and the premises are subsequently sold by the landlord, the payment so made will be good against the purchaser of the property.[99]

Where rent has been paid in advance, and, before the expiration of the term for which the rent has been paid, the property is destroyed by fire, the question may arise whether the tenant can recover from the landlord such a proportionate part of the rent paid as the remainder of the term is of the entire term. For example, suppose a tenant paid a landlord $1,000 in advance for a rental term of a year, and when three months of the term had expired, the property was destroyed by fire. Can the tenant recover three-fourths of his payment, namely, $750, or may the landlord legally retain the full amount? This question has been decided both ways. For example, it has been held that the tenant may recover a proportionate part of the rent, on the ground that

[99] Stone v. Patterson, 19 Pick. 476 (Mass.), 31 Am. Dec. 156.

there is an implied contract by the landlord to furnish the tenant the use of the building for the entire time during which he paid for it.[1] On the other hand, it is held that the tenant cannot recover a proportionate part, but that the landlord may retain the entire amount of the rent, on the ground that the tenant assumed the risk voluntarily, and did not protect himself by any provision to the contrary in the lease, as he might have done.

54. **Change in amount of rent.**—Where, by the terms of the lease, the tenant has agreed to pay a certain rent, the landlord cannot, during the term, increase the amount of the rent, and the tenant cannot insist upon its decrease. The parties, however, by a new agreement, and by a surrender and cancellation of the former lease, can make any change in the amount of rent that they may mutually agree upon. Since this amounts to a new lease, an agreement for the reduction or increase of rent must be in writing, in order to satisfy the statutes requiring certain contracts to be in writing, just as in case of an original lease.[2] Moreover, a mere promise by the landlord to accept a smaller rent than is reserved by the lease may be void for lack of a consideration. A lease may contain a stipulation for an increased rent in case the property is used for some other purpose than the one intended at the time the lease is made. For example, a provision in a lease that the rent shall be increased in case the premises are used for the

[1] Porter v. Tull, 6 Wash. 408, 33 Pac. 965, 36 Am. St. Rep. 172, 22 L. R. A. 613.

[2] Barnett v. Barnes, 73 Ill. 216.

sale of intoxicating liquor, is binding. Where a definite contract has been made for a certain rent, and for a certain period, the fact that the property has materially increased in value, or that the tenant, by his own efforts, as, for example, by improved cultivation of farm lands, has rendered the same of greater worth, will not justify the landlord in increasing the rent. On the other hand, the depreciation in value of the property, or the fact that it is less desirable for residence or business purposes than it was at the time of the commencement of the lease, will not relieve the tenant from his duty to pay the stipulated amount. In either case, the parties will be bound by their original agreement.

55. **Holding over term.**—A tenant who holds over his term is liable for rent for the same period as called for by the original lease.[3] The fact that the tenant holds over does not create a renewal of the original contract, but since the landlord is entitled to a reasonable compensation for the use and occupation of his premises, the tenant will be liable for rent, on the presumption of an implied new contract. Likewise, where the rent is payable from month to month, a tenant at sufferance who does not yield possession of the premises after proper demand has been made will be liable for rent the same as any other tenant holding over. In order, however, to make a tenant liable for rent as a tenant holding over his term, there must be an actual holding over, and the fact that a tenant has left a few articles on

[3] De Pere v. Raynen, 65 Wis. 271, 27 N. W. 155; and see Herter v. Mullen, 159 N. Y. 28, 53 N. E. 700, LEADING ILLUSTRATIVE CASES.

the leased premises, after he has moved out, will not constitute a holding over. Moreover, where it is mutually understood between the landlord and the tenant that the latter is to leave at the expiration of his term, the holding over for a few days, while the tenant is removing his goods, will not render the tenant liable for rent for a new term, but only for the actual time that he has occupied the premises since the expiration of his term. The amount of rent that a tenant holding over his term is under obligation to pay is generally the same as that specified in the original lease.[4] This rule is based upon the theory that the tenant holds over with the consent of his landlord under the same terms as previously existed. Where, however, a tenant holds over without the consent of his landlord, no contract exists, and the tenant will be liable for the reasonable value of the use of the premises, regardless of the amount of rent fixed in the original lease. Moreover, if a landlord notifies a tenant, who is holding over, that an increase of rent will be required, and the tenant continues to remain in possession, his consent to the increase will be implied, and he will be liable for such amount.

56. **Premises untenantable.**—Where a tenant has entered into an express agreement to pay rent during the term, any injury to, or destruction of, the premises by fire or other cause will not relieve him from such duty.[5] A tenant may, however, protect himself from such a misfortune by a proper provision in the

[4] Baltimore, etc., R. R. Co. v. West, 57 Ohio St. 161, 49 N. E. 344.

[5] Cook v. Anderson, 85 Ala. 99, 4 So. 713; and see Gay v. Davey, 47 Ohio St. 396, 25 N. E. 425, LEADING ILLUSTRATIVE CASES.

lease that he will not be liable in case of such destruction of the premises. The fact that the landlord does not rebuild the premises will not, at common law, relieve the tenant from liability for the payment of rent, unless the landlord has entered into a covenant to rebuild in such a case. Likewise, since, at common law, it is not the landlord's duty to repair, a tenant will not be excused from his duty to pay rent because the premises have become so much out of repair that they are untenantable. As in the former case, however, a tenant may stipulate in the lease that he will not be liable for rent if the premises become unfit for occupancy. That the plumbing of the premises becomes defective, or that the place becomes unhealthful, or even infected with disease, is not a defense to the tenant's obligation to pay the agreed-upon rent. Many cases, however, hold that where a room of a building is leased, apart from the leasing of the land itself, and there is an entire destruction of such room or building, by fire or other cause, the tenant will be relieved from his obligation to pay rent, on the ground of the failure of the consideration for which the rent was to be paid. This same result is reached in a number of states, also, by express statutes to this effect.

Eviction. Where, by the fraud of the landlord, the tenant has been induced to accept a lease, he may rescind his contract, and thus relieve himself of his liability for rent. Also, where a tenant has been evicted from the premises by the landlord, or by some other person under a title superior to that of the landlord, or if the landlord, by maintenance of a

nuisance, renders the premises uninhabitable, so that there is a constructive eviction, the tenant who vacates the premises for such just cause will be relieved from any further liability for the rent.

57. **Liens for rent.**—At common law, a landlord has no lien upon the property of his tenant for rent.[6] The lease may, however, contain a provision that gives the landlord a lien on the crops of his tenant, or on other personal property, in case the rent is not paid. Moreover, statutes in many states give a landlord a lien for rent, such statutes generally applying to the crops raised upon the rented land. Such a statutory lien does not, however, give a landlord a right to the possession of the property, but merely a right to collect the rent out of the property specified. Moreover, such statutes are held not to be retroactive, but to apply merely to leases made after their enactment. A statutory lien for rent must be confined to the property designated in the statute, and a landlord's lien on his tenant's crops cannot be extended to other property of the tenant. In some states, a landlord's lien for rent must be recorded, in order to make such lien effective against third persons.

58. **Distress for rent.**—At common law, a landlord's right to seize the personal property of his tenant for unpaid rent is an incident to every lease and need not be mentioned in the lease. This is called the landlord's right of distress for rent. By this is meant that the landlord, in case the rent is in arrears, may take all moveable property upon the leased premises, whether belonging to the tenant or to some other

[6] Powell v. Daily, 163 Ill. 646, 45 N. E. 414.

person,[7] and may hold such property as a lien for the payment of the rent. The landlord's right, however, to seize property other than the tenant's depends upon the fact that it is being used by the tenant, with the consent of its owner. In a number of states, however, where the right of distress still remains, the goods of third persons, found on the leased premises, are by statute especially exempted from seizure.

In order to give one a right of distress for rent, the relation of landlord and tenant must exist. Moreover, it is a general rule that there can be no distress for rent unless there was an express contract to pay rent.[8] A landlord cannot seize property of his tenant unless the rent is actually due and unpaid, and, in case a landlord accepts a promissory note from his tenant for the rent due, he cannot distrain for rent, unless the note is unpaid at its maturity. A landlord may, at common law, take the goods in person, or he may send some agent or some officer to seize them. It is not necessary, however, that the landlord, or the person who lawfully represents him, should make an actual seizure of the goods, since a notice posted on the land, that certain described goods are held by the landlord for rent, may be sufficient. Under statutes, in some states, a warrant must be served by a proper officer. Under the common law, the landlord's only right, after seizure, was to hold the goods until the rent was paid. In other words, he kept or distrained them from the tenant until the tenant per-

[7] Stevens v. Lodge, 7 Blackf. 594 (Ind.).

[8] Melick v. Benedict, 43 N. J. L. 425. Compare, however, Stewart v. Gregg, 42 S. C. 392, 20 S. E. 193.

formed his duty to pay the rent. The landlord was required to take reasonable care of the goods, and could not use them for his own benefit. Under statutes, however, goods thus distrained may be sold after due notice, and the landlord paid out of the proceeds of the sale. The right to distrain for rent still exists in a number of our American states, but in many states it has been abolished altogether by statutes.

59. **Actions for rent.**—A landlord's usual remedy, in case the rent is unpaid, is an action at law for the amount due. Some states, as a substitute for his common law right of distress for rent, permit a landlord to attach a tenant's property, and sell the same, in order to obtain the rent due. When a tenant is sued for rent, he may also set up against his landlord any claim he has against him, providing such claim is one that can be so set up according to the rules of pleading and practice of the state where the action is brought. Under some forms of actions, interest may also be recovered on the amount of unpaid rent from the time it was due.

CHAPTER X.

TERMINATION OF TENANCY.

60. **In general.**—Where a tenancy is for a fixed term, as, for example, for a year, or for a number of years, the term expires at the last minute of the last day of the term. In the case of a lease for a year "from" a certain date, it is the rule that the lease terminates upon the anniversary of the date of the lease. For example, a lease for a year "from" the 1st day of January, 1912, would not expire until the last minute of the 1st day of January, 1913. In many cases, the lease itself may expressly provide when the term shall end. In case the lease reads "to" a certain day, as, for example, "to May 1st, 1913," the term expires at midnight on the preceding day; that is, in this case, at midnight on April 30th. Where a lease provides that its termination shall be optional, without specifying at whose option, it means, in contemplation of law, the option of the tenant.[9] Local custom may regulate the time of the termination of the lease, since a local custom may become so well established that it has the force of law. Thus, by force of custom, a lease may expire at noon on the last day of the term. By the terms of the lease, moreover, a tenancy may be made dependent on some external event. For example, a lease made for "the whole time that the tenant may be postmaster" is a

[9] Com. v. Philadelphia County, 3 Brewst. 537 (Pa.).

good lease, and would expire, as held, with the expiration of the commission held by the tenant.[10]

61. **Notice to quit.**—At common law, in case of a lease for years, no notice to quit is necessary in order to terminate the lease. In the case of a tenancy, however, from year to year, or month to month, a notice to quit is necessary in order to put an end to the relation of landlord and tenant. The parties may expressly agree between themselves, however, in the case of a tenancy from year to year, what length of notice shall be required, but at common law, in the absence of any such agreement, or of local custom regulating the time, a six months' notice is required in the case of a tenancy from year to year.[11] This question is now regulated in most, if not all, states by statutes, a period of thirty days being a common provision of many of the statutes in the case of tenancy from year to year. In case, however, a tenant disclaims or denies that he holds as tenant, no notice to quit is necessary. It is sometimes said that a tenancy at will may be terminated without notice. This, however, means that in absence of a statute no particular length of time is required for a notice to terminate the tenancy, but since from the very nature of such a tenancy it may be determined by the will of either party, there must be some intimation, either express or implied, from one of the parties, that the tenancy is at an end. In many states, moreover, the statutes provide that a formal notice shall be given by one of

[10] Easton v. Mitchell, 21 Ill. App. 189.

[11] Hunter v. Frost, 47 Minn. 1, 49 N. W. 327, LEADING ILLUSTRATIVE CASES.

the parties to the other. The parties may also agree, even in the absence of such a statute, that some notice shall be given. Some of the statutes provide for a notice of thirty days, in order to terminate a tenancy at will, making, however, a provision, in some states, that in case a tenant at will commits waste, no such notice shall be required. At common law, a mere notification by the tenant to his landlord that he terminates the tenancy will not be effective, however, unless he actually gives up possession. In the case of a tenancy at sufferance, that is, where a tenant holds over after the expiration of his right of possession, no notice to quit is required, and the landlord may enter upon the land, or the tenant may leave it, at any time without one giving notice to the other. However, even in cases of tenancy at sufferance, there are statutes, in some states, requiring some notice to be given, in order to terminate the tenancy.

62. **Death of the parties.**—A lease for a definite term, such as a lease for years, is not terminated by the death of either the landlord or the tenant. Likewise, a tenancy from year to year is not ended by the death of either of the parties, since the tenant's rights under the lease would pass to his personal representatives. A tenancy at will, however, is a personal relation between the original landlord and his tenant. Consequently, it will be determined, by operation of law, upon the death of either of the parties.

63. **Sale of premises.**—In the absence of any provision in the lease, or other express agreement between the parties, a lease for a definite length of time will not be ended by the mere sale of the premises by

the landlord to some third person.[12] Whether or not a sale of the premises, either under a mortgage foreclosure or in execution of some claim or judgment against the landlord, will put an end to the tenancy, depends upon the time when the lease began. For example, if a mortgage upon the premises is given, or a judgment is rendered, before the lease is made, the rights of a purchaser at a mortgage sale, or at an execution sale, are superior to the rights of the tenant. In case, however, the lease was made prior to the giving of a mortgage, or the rendering of a judgment, the purchaser in connection with such sales will take the property subject to the incumbrance of the lease.

64. **Destruction of the premises.**—It has already been stated in a previous chapter that, as a general rule, at common law, the destruction of the premises does not relieve the tenant from his obligation to pay rent. This arises from the fact that unless the lease contains some agreement to the contrary, the destruction of the property does not, in itself, terminate the lease. However, as also previously pointed out, where the leased premises consist of a building, or of a room, apart from any enjoyment of land, the destruction of such building, or of such room, since it destroys the consideration, will put an end to the tenancy.[13] This general rule that the destruction of the premises does not terminate the lease applies both to tenancies for a fixed period and also to tenancies from year to year.

[12] Aydlett v. Neal, 114 N. C. 7, 18 S. E. 973; Hickox v. Seegner, 123 Wis. 128, 101 N. W. 357.

[13] Shawmut Nat. Bank v. Boston, 118 Mass. 125.

65. **Eviction.**—In case a tenant is evicted, either actually or constructively, by his landlord, he may, at his election, treat the tenancy as ended. Consequently, where the landlord has agreed to repair, but fails to do so, leaving the premises in an untenantable condition, the tenant is constructively evicted, and he may treat the lease as ended. It has been held, however, that an eviction from a part of the leased premises, as where a landlord builds a wall, which encroaches a few inches over his tenant's line, does not necessarily put an end to the lease.[14]

66. **Forfeiture.**—A lease may be terminated by forfeiture. This question has been discussed in a previous chapter in connection with conditions. It will be remembered, however, that a condition that renders a lease voidable on failure of the tenant to comply with its requirements is available only at the option of the landlord. Forfeiture may also result from the fact that a tenant denies his landlord's title, and sets up an adverse claim in himself. It has been previously pointed out, in connection with the duties of a tenant, that he cannot deny his landlord's title. Consequently, where a tenant repudiates the relationship of landlord and tenant, and sets up an opposing claim in himself, he becomes a trespasser, and forfeits his term. There must be, however, some action on the tenant's part, which amounts to a general disclaimer of the landlord's title, in order to produce a forfeiture of the lease. For example, a mere refusal to pay rent when due, where the payment of rent was not made a condition, would not amount in itself to

[14] Smith v. McEnany, 170 Mass. 26, 48 N. E. 781, 64 Am. St. Rep. 272.

a denial of the landlord's title, and thus work a forfeiture of the estate. In some states, a lease may also be forfeited for certain causes specified by the statutes, as, for example, for the illegal sale of intoxicating liquors upon the premises; or for a failure to pay rent; or for a sub-letting or assignment of the premises, contrary to the tenant's agreement not to do so. The landlord's right to reënter and to regain possession of rented premises, in case of forfeiture, may, however, be waived by him, and generally, in connection with breaches of conditions, an acceptance of rent by the landlord, after he has full notice of the breach, will amount to a waiver on his part. Since it is optional with the landlord whether or not he will take advantage of a forfeiture, it is his duty, in case he decides to enforce his rights, to give due and timely notice to the tenant, or to take some positive action in evidence of his intention, as, for example, reëntering upon the land, or leasing the land to another person, or bringing suit to recover possession of the premises.

67. **Merger.**—Where a greater and a less estate coincide in the same person, there being no intermediate estate, the less estate is said to merge in the greater, and consequently to be destroyed. For example, if a tenant has a lease for ten years, and, during the continuance of such lease, buys the entire property from his landlord, the tenancy for years will be merged in the fee, and consequently will be terminated. The same person cannot, of course, be both landlord and tenant of the same property at the same time. The two estates, however, must coincide in the

same person, and also under the same rights. Consequently, if a landlord marries his tenant, no merger results, since the landlord still owns the reversion in his own right and has, at common law, merely his marital right in the lease of the wife. Also where a tenant makes his landlord his executor under his will, the two estates are not merged, since the landlord does not hold both estates in his own right, but holds his deceased tenant's lease merely under his right as executor.

68. **Surrender.**—Another way by which a lease may be terminated is by surrender. By surrender is meant a yielding or giving up, by the tenant, of his term to the landlord so that the tenancy becomes ended by mutual agreement. A surrender may be brought about either by express words on the part of landlord and tenant or by operation of law. When the parties without express words imply by some act that they both consider a surrender as made, it is said to be made by operation of law.[15] Although a lease has been made in writing, nevertheless it may be surrendered by an oral agreement between the parties. A surrender arises by operation of law when a condition of fact exists that is inconsistent with the continuation of the former relation of landlord and tenant. For example, where a new tenant has been substituted, by mutual consent of the parties, for the former tenant, the former lease will be deemed surrendered by operation of law. A surrender must be made to the landlord, or some one having authority to represent him as agent, and in order to make a sur-

[15] Beall v. White, 94 U. S. 382, 24 L. Ed. 173.

render effective, it must be accepted by the landlord. The mere giving up of the key of the premises to the landlord will not, in itself, amount to a surrender, since, in such a case, the key must be accepted by the landlord, with the intention on his part of terminating the lease.[16] In case a tenant abandons the premises without the consent of the landlord, such an abandonment will not, in itself, amount to a surrender of the lease. The landlord may, however, by his subsequent acts, show that he regards the lease as surrendered, as, for example, by taking full possession of the property and renting it to other persons. A mere entry, however, by the landlord upon the land for temporary purposes, after an abandonment by his tenant, would not amount to an acceptance on the landlord's part of a surrender. In case a surrender of the lease is made, the rights of a sub-tenant will not be affected. In such a case, although the relationship of landlord and tenant will be ended between the original parties, yet, where the rights of the sub-tenant arose before the surrender was made, his right will continue just as if no surrender had been made.[17]

69. **Eminent domain.**—By the exercise of the authority vested in both nation and state to take private property for public purposes, upon just compensation, a leasehold may be terminated, as well as any other interest in land. Consequently, where leased land, or buildings, are taken for the city, or for other public uses, the lease becomes void. Where, however, only a part of the leased land is taken, the tenancy

[16] Thomas v. Nelson, 69 N. Y. 118.
[17] McKenzie v. City of Lexington, 34 Ky. 129.

will not be terminated, unless the taking of such part amounts to an eviction. A tenant whose lease has been terminated by the exercise of the right of eminent domain is entitled to a just compensation for the loss suffered by him. Generally, the rent paid by the lessee is a means of estimating the amount of his damage. Where only a part of the premises is taken, the amount of compensation may be found by taking the difference between the fair market value of the lease before and after the taking. When his tenancy is thus terminated, a tenant has also a right to be compensated for improvements made by him upon the leased premises under an agreement with his landlord that he should be repaid for the cost of the same. Moreover, that the lease contains a covenant for its renewal is a proper element of damage to consider, when estimating the amount of compensation to be paid. Profits resulting from business are not, however, to be considered.

CHAPTER XI.

DELIVERY AND RECOVERY OF POSSESSION.

70. **Tenant's duty to deliver.**—Upon the termination of the tenancy, it is the tenant's duty to deliver up to his landlord the possession of the entire premises. His failure to do this makes him a tenant holding over his term, and liable for subsequent rent, as we have already seen. It is the tenant's duty to surrender possession when his lease has ended, without waiting for any demand from the landlord. The tenant is not entitled to remain in possession for the purpose of removing his goods, or because he has made improvements upon the premises which the landlord was to pay for, but for which, in fact, he has received no pay. In case a tenant has sub-let the premises, it is his duty to see that the sub-tenant also yields possession at the close of the original term, since a holding over, either by a sub-tenant or by an assignee, will be a holding over by the original tenant, for which the latter will be responsible.

71. **Reëntry by landlord.**—Upon the termination of the tenancy, the landlord has the right of possession, and by virtue of such right he may reënter and take the possession unto himself. If it is possible, a landlord seeking the recovery of possession by reentry should enter without violence. It is, however, the general rule, at common law, that, although he does enter with force, he will not be subject to a civil

suit for damages, brought against him by his tenant, since the landlord has the legal right of possession. Under statutes, however, making forcible entry and detainer a penal offense, a landlord may be prosecuted criminally for a violent entry, although he would not be liable to a civil prosecution.[18] Consequently, in order to avoid a breach of the peace, by a forcible entry and detainer, a landlord should, in all cases of doubt, apply to the courts for the purpose of recovering possession of his property. Entry by force may, however, in some cases, be justified. For example, where a tenancy has ended and a tenant has permanently left the premises, removing therefrom all his goods, and has locked up the doors, taking the key with him, the landlord may break open the doors for the purpose of making a reëntry. Upon the termination of the tenancy, a reëntry may be made by the landlord, or by any other person who is entitled to the possession at the time. If the tenant has not removed his household goods from the premises, upon the termination of his lease, the landlord may remove such property, using no more force than is necessary.

72. **Actions for recovery.**—The usual remedy, at common law, for the recovery of possession of leased premises, after the right of possession has accrued to the landlord, is the action of ejectment. The statutes, however, provide short, or summary, proceedings whereby such premises may be recovered in a more prompt and adequate way. When the action of ejectment is brought, the right to possession must be satisfactorily shown, as must also the fact that the

[18] Low v. Elwell, 121 Mass. 309, 23 Am. Rep. 272.

tenant is still in possession and refuses to make delivery thereof. Under some statutes, due notice to quit must also be given before action can be brought.

Summary proceedings, under the statutes, are designed to provide a speedier method of recovering possession than is afforded by the common law action of ejectment. Since these proceedings depend entirely upon the statutes, the provisions of the statutes must be strictly followed.[19] Such statutes generally apply only to cases where the relationship of landlord and tenant exists, and where the landlord is entitled to immediate possession. These statutory remedies form an effective means of ousting tenants who unlawfully hold over their terms. Generally, a notice to quit is required, but such notices, under the statutes, are ordinarily but a few days in length. Judgment in such actions, when successfully maintained, is usually that the plaintiff is entitled to possession. By proper writ, issued by the court in which the action is brought, the sheriff or constable may forthwith oust the offending tenant, and place the landlord in actual possession.

BIBLIOGRAPHY.

For a more extended study of the subject of Landlord and Tenant, the reader is referred to the authoritative texts here cited, namely: *Wood's* treatise on The Law of Landlord and Tenant; *Jones'* treatise on the same subject; *Tiffany,* in two volumes, and *Taylor's* American Law of Landlord and Tenant (18th ed.), in two volumes. *Washburn's* Real Property will also be found very helpful. An exceedingly valuable work is the article on Landlord and Tenant in the 24th volume of Cyclopedia of Law and Procedure, edited by Mr. Donald J. Kiser. An exhaustive citation of the cases will also be found in that article.

[19] McMullin v. McCreary, 54 Pa. St. 230.

LAW OF IRRIGATION AND WATER RIGHTS

BY
JAMES W. McCREERY*

CHAPTER I.

INTRODUCTORY—RIPARIAN RIGHTS.

1. **In general.**—At the common law, water is classed with air and light as one of the universal elements to which the idea of property attaches only in a qualified and very limited way. Water makes the earth habitable, is directly and always necessary to the support of both vegetable and animal life, and its use is required in commerce and in almost every department of productive industry. Water being thus constituent in the economies both of the earth and of man upon the earth, various rights arise out of its manifold utilities, of which the law, from time immemorial, has taken notice.

2. **Public rights in water.**—For the most part rights which arise in connection with the great bodies of water are public rights of navigation and the world's commerce, although along the shores and

* Of the Colorado Bar; Lecturer on Irrigation and Water Rights, University of Colorado Law School; former member of Colorado State Senate; former president of Colorado State Bar Association. Author of various legal articles on water rights and other subjects.

at the termini of these public highways and within the tidewater area arise various private rights in connection with the public rights.

Private rights in water. The waters of innavigable streams are particularly susceptible to the will and use of man, in common with many other natural resources immediately connected with the land. Upon these inland streams and bodies of fresh water, therefore, another class of rights, for the most part private, arise. These rights possess the attributes of property and may be comprehended under the general description of rights to the use of water for domestic purposes, for irrigation or agricultural purposes, and for mining and manufacturing purposes.

3. **Water rights—Regulation.**—Two legal systems of rules have been established for the regulation and protection of these rights generally, at different times and places.

In humid climates generally these rights attach to the flow of water in the streams, for domestic uses, power purposes, and the incidental advantages to the land through which the waters flow. These uses are direct and are in the immediate enjoyment and control of the owners of the lands bordering upon the streams or through which the streams flow. These property rights are denominated generally Riparian Rights.

On the other hand, in arid climates rights to the use of the water of the streams are acquired by the diversion of water from the streams, to lands more or less remote, and the application thereof to such lands for the purpose of producing or increasing the

production of agricultural crops, and for other beneficial uses. These uses are indirect and not connected immediately with the stream itself. Such rights are comprehended under the general description of Rights of Appropriation.

4. **Different systems result of diversities of climate.**—These two kinds or classes of water rights arise chiefly from differing conditions of climate as related to the dominant necessities of the population in different countries or different parts of the same country in the uses of the water supplies, not only for the immediate preservation of individual human life, but also in providing for and promoting the industries and productions necessary for the foundation and continuance of the larger life of the community and the state.

5. **Riparian rights defined.**—Riparian water rights are those rights which accrue to the owners of land along the banks of streams, being connected with and incidental to the ownership and use of the land. These rights are *ex jure naturae,* as parcel of the land. Each riparian proprietor therefore has the right to have the stream flow to his land along the natural channel of the stream and in the usual quantity and may use it for all purposes to which it may be applied beneficially, without injury to other riparian owners above or below, and may transform the gravity of the stream by means of canals, water wheels, devices and appliances, into mechanical power. If the water is diverted from the stream it must be returned to the stream unimpaired in quality and undiminished in quantity.

The same right attaches to every landowner along the stream in the enjoyment of his property and he may use the water for ordinary purposes as it flows past or through his land, including the use for power and domestic purposes, for watering stock and incidentally for keeping his meadows moist and productive. Moreover, each riparian proprietor owns that portion of the bed of the river not navigable which adjoins his land, *usque ad filum aquae,* that is, to the central thread or line of the stream;[1] but he can only take from the stream and consume so much of the water flowing therein as his existing natural necessities require. These rights may, however, be modified by grant or prescription.[2]

6. **The rule of returning water to stream.**—The rule that there shall be no diminution in quantity or impairment of quality in the water of the stream by the riparian proprietor is qualified and limited in this respect, that any use of the water for the natural needs of man and beast necessarily implies some consumptive use, and therefore some diminution in quantity of the water in the stream by such use. This is indispensable to any real or valuable use of the water and therefore consistent with the common right, and is an implied element in the right of all to use the water in the stream. What is "reasonable" therefore enters into the rule and prevents that construction which would destroy "common use" and at the same time preserves the preferential right of the riparian owner.

[1] 2 Blackstone, Commentaries, p. 402 and note 7.
[2] 3 Kent, Commentaries, 439-447.

7. **The rule of reasonable use.**—The practical question is, What is a reasonable use of running water by the upper proprietor when the fluid itself is entirely consumed? As substantially said in a learned opinion: The wants of man in regard to the element of water are either natural or artificial. Natural wants are such as are absolutely necessary to be supplied in order to sustain life. The artificial wants of man in regard to water are such as, when supplied, promote his comfort and prosperity. Domestic uses are indispensable in all countries and under all circumstances and hence the riparian proprietor may take water from the stream and consume it to the extent necessary to supply these indispensable domestic uses, without being chargeable with injury to the rights of other riparian proprietors along the stream. Generally speaking, the diversion and consumption of water for irrigation and manufacturing purposes is not directly necessary to the support of life or indispensable primary uses of man. Nevertheless, riparian proprietors have also the undoubted right to use water for manufacturing purposes.[3] But the water, after being diverted by the "millrace" to the wheel, must be returned to the stream through the "tailrace," so that the quantity shall not be diminished to the injury of the lower proprietor.

The riparian owner may also divert water from the stream for the irrigation of his meadow, but inasmuch as this application of the water to the soil is in part, at least, a consumptive use, since the

[3] Evans v. Merriweather, 3 Scam. 491-495 (Ill.), 38 Am. Dec. 106.

water is dissipated by evaporation rather than being returned to the stream, such use under the rules of law pertaining to riparian rights must be limited to a use that will not interfere with the requirements of the lower proprietors on the stream to whom the use of the water is essential, to supply at least domestic and stock purposes.

As has already been suggested, the right to the use and enjoyment of the water flowing in the innavigable streams by riparian proprietors of lands is an incident to the ownership of the soil, yet the right itself is a distinct property right and is severable from the principal estate by grant or prescription. In this respect the general rule as to appurtenances governs.[4]

8. **The doctrine of riparian rights unsuited to arid climates.**—In this country until about sixty years ago, water rights were almost exclusively considered under the head of riparian rights, but when the settlement of the arid western part of this country and its development for agriculture began, it was found that the most beneficial, important and valuable uses of water could not be realized by the settlers, under the rules of the common law pertaining to riparian rights. Accordingly, in these new settlements the technical rules of law in regard to the use of water of the running streams were modified or abrogated and different regulations were devised, adapted to the industrial and climatic conditions there present. A practical system for the diversion of water from innavigable streams was

[4] Bardwell v. Ames, 22 Pick. 333 (Mass.).

inaugurated and the water applied to beneficial uses, separate and apart from the land constituting the public domain, the right to such uses being considered as an estate separate from, rather than as appurtenant to, the real estate for which the water was used.[5]

[5] Irwin v. Phillips, 5 Cal. 140; Atchison v. Peterson, 20 Wall. 507 (U. S.).

CHAPTER II.

RIGHTS OF APPROPRIATION OF WATER.

9. **Appropriation defined.**—Appropriation is the diversion of water from the natural stream or source of supply to some beneficial use followed by the actual application of the water to the use designed.[6]

Appropriation has also been defined as "the intent to take, accompanied by some physical demonstration of the intent and for some valuable use."[7] Also, "appropriation consists of an actual diversion of water from the natural stream followed within a reasonable time thereafter by an application thereof to some beneficial use."[8]

10. **The law of necessity.**—Appropriation of water, under these definitions, involves the right to take and use the water diverted for consumptive uses, without any obligation to return the water to the stream. This right arises by the law of necessity, *ex necessitate rei* (from the necessity of the thing).[9] Incident to the physical and climatic conditions of the country, the arid nature of the climate requires, among other things, the artificial application of water to the soil to make agriculture successful. This application of water to the soil

[6] McDonald v. Bear River, etc., Co., 13 Cal. 220.

[7] Larimer County Res. Co. v. People, 8 Colo. 614, 9 Pac. 794.

[8] Windsor Res. & Can. Co. v. Lake Supply D. Co., 44 Colo. 214, 98 Pac. 729.

[9] Lobdell v. Simpson, 2 Nev. 274; Willey v. Decker, 11 Wyo. 496, 73 Pac. 210.

is described as irrigation and is the most prominent of the beneficial uses upon which the law of appropriation is based, though there are other beneficial uses which will be alluded to in discussing the general subject.

Irrigation. The title, based upon these fundamental conditions, is a new title in the law so far as this country is concerned, though old in the world's history. In humid climates, the most imperative demand for the use of water is for domestic purposes; in the arid climates, while the domestic purpose still remains absolute, even that is overshadowed by the necessity of the use of water for food production and therefore the use of water for agricultural purposes becomes the paramount interest and necessity in every attempt to settle and populate such arid country.

Under both systems, the use of water for manufacturing purposes is in a measure secondary; although, as we shall see, the right of appropriation extends not only to agricultural purposes, but to domestic and manufacturing purposes as well.[10]

11. **Beginnings of the practice of appropriation.** —Since the law pertaining to appropriations of water for beneficial uses in the arid regions of this country arises out of the very physical laws of nature of the arid country, it is not the product of a priori (from what goes before) or formal legislation.[11]

This law had its beginnings in this country in the

[10] Evans v. Merriweather, 3 Scam. 491-495 (Ill.), 38 Am. Dec. 106; Schilling v. Rominger, 4 Colo. 100.

[11] Coffin v. Left Hand D. Co., 6 Colo. 443.

informal legislation and by-laws adopted by the early settlers and communities of settlers in the western country. Under the conditions there prevailing, both as to the aridity of the climate and the topography of the country, the water was of little or no use while flowing in these mountain streams; there were no riparian proprietors and in the nature of the case could be none. In order to utilize either the water itself or the impetus of the flow, the water must be diverted from the stream and carried by ditch, flume and tunnel around, over or through mountain spurs and divides to places of use, either for irrigation, the washing of gold from the sands, or operating the mills and mining machinery required in these industries, without possibility of the water being returned to the original stream, once it was diverted.

12. **Locus of use.**—Contrary to the rule as to riparian rights, the use by appropriation is not confined to lands on the banks of the stream. The water taken from the stream need not be returned thereto; it need not even be used within the watershed of the stream and may be carried over intervening divides to the watersheds of other streams and there used and the surplus, if any, returned to such other streams instead of to the immediate stream from which the water is first diverted.[12]

13. **Beginnings of the law of appropriation.**—This common use of the water by common consent of all ripened into local regulations which in turn became, and still remain, the fundamental formulae of law

[12] Coffin v. Left Hand D. Co., 6 Colo. 443.

concerning the acquisition of property in water rights for beneficial uses. Furthermore, these appropriations of water for beneficial uses, thus acquired by common consent and actual use without paper title or grant, were presently recognized as existing and legal rights of property by the earliest decisions of courts in these new communities and later by the acts of Congress of the United States.

Acts of Congress. By the Act of Congress of 1866, amended in 1870 (Rev. Stats., 1878, §§ 2339, 2340), Congress recognized the rights acquired by settlers under these community arrangements, not by the granting of any new right, but in express recognition of rights already accrued and vested.

Decisions of courts. Previous, however, to this congressional legislation several of the territorial courts had already decided cases upon the principle that the law of necessity prevailing in the arid regions must be recognized and given effect by the rule of appropriation. Upon these decisions of the federal and state courts, and in accordance therewith, has been erected the whole structure of irrigation law. In the enactment of statutes they have been copied and in the subsequent opinions of the courts they have been followed.[13]

14. **The case of Atchison v. Peterson.**—This decision may be said to contain the original formulation of the law of appropriation, as follows:

"The government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application

[13] Irwin v. Phillips, 5 Cal. 140; Atchison v. Peterson, 20 Wall. 507 (U. S.).

of the common law doctrine of riparian proprietorship with respect to the waters of those streams. * * * And he who first connects his own labors with property thus situated and open to a general exploration does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. * * * So fully recognized have become these rights, that without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the lawmakers."[14] To the same effect are the decisions in many other early cases in different jurisdictions.[15]

15. **Appropriation always the rule in the arid parts of the country.**—This doctrine of appropriation has likewise been generally held to apply and to have existed from the date of the earliest appropriations of water within the arid regions, and not to have had its beginning, as a new right or grant, with the Act of Congress of 1866, which act and its amendments have been held to be declaratory only of the existing law.[16]

With the adoption of the constitutions of the several states embraced within the arid region of the

[14] 20 Wall. 507, 512, 513 (U. S.).

[15] Irwin v. Phillips, 5 Cal. 140; Osgood v. Water & Mining Co., 56 Cal. 571; Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. 258, LEADING ILLUSTRATIVE CASES; Lobdell v. Simpson, 2 Nev. 274; Thorp v. Freed, 1 Mont. 651; Yunker v. Nichols, 1 Colo. 551; Basey v. Gallagher, 20 Wall. 670 (U. S.).

[16] Coffin v. Left Hand D. Co., 6 Colo. 443; Union Mill & Mining Co. v. Dangberg, 81 Fed. 73, LEADING ILLUSTRATIVE CASES.

country, these fundamental grounds of right of property have remained unchanged. None of these constitutions undertake to establish new foundations for irrigation rights but simply to provide for the best method of regulating the acquisition and enjoyment of such rights.[17]

Not only so, but since such rights have accrued by virtue of the laws of necessity, regulated by community by-laws and local police regulations, such laws and regulations have become laws of property which change not, and which cannot be set aside or the titles erected thereon defeated or property taken away. They have become res adjudicata in the high and broad sense of being a part of the very institutions of the country upon which these organized states and communities are established.[18]

16. **Theory of origin—Conflict.**—This theory of right of appropriation has been developed in part from the riparian doctrine theretofore prevailing, founded on the principle that, water being necessary for the support of human life, the paramount or primary wants of man should first be supplied, and that in order that this result might effectually follow, the natural stream must be preserved in its integrity and its flow confined without diminution or deterioration to the natural channel so far as possible.

On the other hand, the arid condition of the western country was such that riparian rights, properly

[17] Larimer County Res. Co. v. People, 8 Colo. 614, 9 Pac. 794.

[18] Irwin v. Phillips, 5 Cal. 140; Union Mill & Mining Co. v. Dangberg, 81 Fed. 73, LEADING ILLUSTRATIVE CASES; Carson v. Gentner, 33 Ore. 512, 52 Pac. 506; Murray v. Tingley, 20 Mont. 260, 50 Pac. 723; McGinness v. Stanfield, 6 Idaho 372, 55 Pac. 1020.

lar source of water supply have been subsequently passed or not.[20] In the discussion of the subject, therefore, it will be necessary to define and consider several subtitles describing the possible sources of water supply, viz.: (a) natural streams or water courses; (b) tributaries; (c) springs; (d) lakes; (e) flood waters; (f) underflow; (g) underground streams; (h) percolating waters; (i) seepage waters; (j) surface and waste waters.

18. **Natural streams or water courses.**—A natural stream or water course consists of a bed or channel with banks confining and directing a permanent flow of water. "A river is a running stream of water, pent in on either side by banks, shores or walls."[21] To constitute a river or water course it is not absolutely necessary that the body of water should be constant in volume, or even continuous in its flow. But it would seem that the flow should depend upon permanent conditions, be at least periodical, or regularly recurring at the same season of each year, and should come from or be supplied by a fixed source, such as springs, melting snows, or a natural drainage of the annual precipitation of a defined watershed.[22] But it is not essential that the water course should have existed from time immemorial.[23] The water flowing in these streams or water courses, in the arid portion of the country, is expressly subject to appropriation for beneficial uses by both the decisions and the statutes.

[20] Larimer County Res. Co. v. People, 8 Colo. 614, 9 Pac. 794.
[21] Gould, Waters (2d ed.), § 41.
[22] Simmons v. Winters, 21 Ore. 35, 27 Pac. 7.
[23] Rait v. Furrow, 74 Kan. 101, 85 Pac. 934, LEADING ILLUSTRATIVE CASES.

19. **Tributaries.**—A tributary of a stream is simply one of the smaller streams flowing into and contributing its volume to make up the large stream. It is a part of the main stream, and has no separate existence, definition or description of its own. Appropriations of water from the tributaries of a stream are appropriations from the stream itself, and conversely appropriations from the stream are appropriations from its tributaries.[24]

20. **Springs.**—The term "spring" describes the original or primary source of a running stream, whether the stream be considered as the main stream or a tributary. A spring is the rising or springing out of water from the soil and has its source of supply from the saturation of the earth by rains and melting snows. A spring is the natural drainage of the land.

A stream of water flowing directly from a spring is subject to appropriation, although it has been frequently held that this right of appropriation is inferior to the preferred right of the owner of the land upon which the spring arises.[25]

21. **Lakes.**—Lakes or ponds are bodies of standing water, without flow or current, and of a permanent character. Small natural lakes are usually private, belonging to the owner of the lands upon which they are situate, and are rarely subject to appropriation, unless the lake itself forms a tributary to a nat-

[24] Low v. Rizor, 25 Ore. 551, 37 Pac. 82; Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513; Ogilvy I & L. Co. v. Insinger, 19 Colo. App. 380, 75 Pac. 598; Water Supply & Storage Co. v. Larimer & Weld Res. Co., 25 Colo. 87, 53 Pac. 386.

[25] Brosnan v. Harris, 39 Ore. 148, 65 Pac. 867, 87 Am. St. Rep. 649; Strait v. Brown, 16 Nev. 317.

ural water course and furnishes a more or less constant supply thereto.

Artificial lakes or reservoirs are constructed throughout the arid region for the purpose of conserving the waters diverted and appropriated in times of abundance, to be used subsequently and in times of scarcity for irrigation and other beneficial uses. These waters are not subject to general appropriation, having been appropriated by the storage and segregation for private use.

22. **Flood waters.**—Flood waters, also sometimes called "storm waters," are the waters coming from heavy rains in the foothills and upon the plateaus, mostly in the summer season, collected by water courses, gulches, ravines, and natural drainage channels, and thence carried to the nearest streams or discharged upon the plains and level lands of the country. When these flood waters reach or are carried by natural streams or water courses, they constitute part of the waters of such streams, and, when available, of the appropriations made from such streams, but they are not subject to separate or independent appropriations as against prior appropriators from such streams. When such flood waters are collected and carried by gulches and ravines, which do not have the characteristics of water courses, and especially when discharged upon the plains, remaining as surface waters without connection with any natural stream, they may be appropriated for beneficial uses without regard to the status of the neighboring streams or the water district in which they are found, and may be taken and diverted from the

ravines through which they flow, or, when they reach the plains, before they become so spread or diffused that they are no longer capable of control or capture.[26]

23. **Underflow.**—This term is used to describe waters flowing through the soil adjacent to general drainage channels and streams of the country. Such underflow constitutes a part of the stream and is physically connected therewith, except that the volume of flow is greatly diminished by the presence of earth through which that part of the stream flows. In such cases the underflow proceeds along the valleys within which the surface stream flows and in the same direction, and is held to constitute a part of the stream. Most of the natural streams of water in arid regions consist of surface and also subsurface flow, both of which are part and parcel of the same stream; they together constitute one stream and may be indiscriminately drawn upon to supply the same water rights.

There is no distinction in the application of the law of appropriation between the surface and the subsurface flow of the stream. Any diversion of water from the surface stream as a matter of necessity affects the maintenance of the subsurface flow, and any diversion from the subsurface part of the stream necessarily affects the surface flow, and, while the surface flow steadily diminishes during the summer months, the subsurface flow continues substantially the same throughout the year,

[26] Denver, Texas & Ft. Worth R. R. Co. v. Dotson, 20 Colo. 304, 38 Pac. 322; 2 Kinney, Irrigation and Water Rights, § 653.

and always constitutes the permanent and more valuable part of the entire stream. For any disturbance of the subsurface stream by one who is not an appropriator or by a junior appropriator, the senior appropriator has his remedy by injunction and damages.[27]

Also, if land be rendered productive by the natural overflow of water from the stream or by subirrigation without the aid of ditches or appliances, such use and enjoyment of the water is protected as an appropriation from the stream.[28]

A diversion of the underflow may not be made or an appropriation thereof effected as being independent of the natural stream. Such attempted diversions have been frequently enjoined. Whatever water is brought to the surface, if a part of the underflow, belongs to appropriators from the stream in the order of their priorities.[29]

24. **Underground streams.**—Underground streams are of two kinds: (a) those which form a part of surface streams and have well-known courses; (b) those whose courses are entirely subterranean, having no known connection with surface running streams. It is underground streams of the latter description only to which it is necessary to refer under this title. It is well settled that the waters of underground streams, when discovered and diverted, are governed by the same rules of law in reference to the appropri-

[27] City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585; Platte Valley Irr. Co. v. Buckers Irr., etc., Co., 25 Colo. 77, 53 Pac. 334; McClellan v. Hurdle, 3 Colo. App. 430, 33 Pac. 280.

[28] Thomas v. Guiraud, 6 Colo. 530.

[29] Buckers Irr., Mill. & Imp. Co. v. Farmers' Ind. D. Co., 31 Colo. 71, 72 Pac. 49.

ation thereof as are surface streams. So long as these underground streams have no known connection with surface streams, either directly or as tributaries, independent appropriations may be made therefrom and the waters may be diverted and carried to the place of use without reference to the rights of appropriators from surface streams in the same vicinity. Waters so appropriated are frequently described as "developed" waters.[30]

Furthermore, the waters when diverted may be turned into natural surface streams and water courses and again taken out at the desired place of use as an independent supply from the stream, without in any manner being impaired or burdened by prior appropriations made from such stream and subject only to the natural waste in the carriage thereof.[31]

But in all such cases the burden is upon the person who turns any such independent water supply into a public stream to show that the waters so turned in are derived from underground streams or other sources having no connection with the stream or water course sought to be employed as a conduit.[32]

Water diverted by tunneling a mine and turned into a public stream for carriage affords an illustrative case of waters of an underground stream not tributary to the main stream and subject to independent appropriation.[33]

25. **Percolation.**—This is an old title in the law

[30] Howard v. Perrin, 8 Ariz. 347, 76 Pac. 460; Hanson v. McCue, 42 Cal. 303.

[31] Herriman Irr. Co. v. Keel, 25 Utah 96, 69 Pac. 719, 726.

[32] Smith v. Duff, 39 Mont. 382, 102 Pac. 984; Howcroft v. Union & J. Irr. Co., 25 Utah 311, 71 Pac. 487.

[33] Herriman Irr. Co. v. Keel, 25 Utah 96, 69 Pac. 719, 726.

and does not belong to the subject of irrigation. It means water held in the soil and making some movement or progress through the soil without a definite channel or direction, not apparently connected with any natural drainage system of the country or natural stream. Percolating waters, as thus defined, have always been held to be a part of the soil, and, as the owners of the land have proprietorship downward to the center of the earth and upward to the skies, percolating waters are included in the dominion of ownership of the freehold.[34]

Percolating waters are distinguished from underflow in this: that in percolating waters there is no apparent or traceable connection with any natural stream within the territory where such percolating waters are found, and they appear to come from unknown sources other than those from which the neighboring stream is supplied.

26. **Seepage or return waters.**—These terms describe waters saturating the soil, coming from artificial sources, as distinguished from natural streams. Otherwise stated, seepage accrues from the use of water from a stream for irrigation upon neighboring lands, such water sinking into the soil and passing through it as return water to the stream, but before reaching the stream often appearing by oozing upon the surface of the land, either to its benefit or damage.[35]

Seepage waters, as thus defined, are not considered

[34] Vanderwork v. Hewes, 15 N. M. 439, 110 Pac. 567; Sullivan v. Northern Spy M. Co., 11 Utah 438, 40 Pac. 709; Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748.

[35] 2 Kinney, Irrigation and Water Rights, § 1207.

as either percolating waters or underflow connected with the streams, but in a limited way are subject to appropriation, both under the statutes and the decisions of the courts. The owner of the land upon which such seepage waters arise is held to have the right to the use of the water upon his own lands and the right to dispose of such water to those who may employ it, by grant or contract, and to this extent it is held to be an appurtenance to the land. This rule, however, has not been settled by all the arid states, some of them restricting such waters to a "reasonable use" upon the lands from which they are developed.[36]

These seepage waters are not subject to appropriation by a stranger as against the owner of the soil, although an appropriation may be acquired with the acquiescence or express consent of the owner of the land. Nor are they subject to the burden of any prior appropriations from the neighboring stream, because not a part of the stream. But if such seepage waters coming to the surface of the land have reached the stream and communicated therewith, particularly by open channel over the surface of the land or by a well-established subterranean connection, such waters are publici juris and a part of the flow of the stream to which prior appropriators may maintain a claim. The case may be put this way: When seepage waters arise upon land, the possession of the land gives the possession to such waters; but when the seepage water has escaped from the land and established connection with the natural

[36] Garns v. Rollins, 125 Pac. 867 (Utah, 1912).

stream, possession of the landowner has been lost, and he can no longer assert any proprietary right in such waters.[37]

When seepage waters arise on private lands to the damage of the proprietor, he has a right to drain his lands for the benefit thereof in any manner which will best subserve his purpose and without reference to the rights of appropriators from adjacent or neighboring streams, and in so draining his land for his benefit he still retains title to such water by drainage and he may take and use it upon his own lands or he may perhaps sell and dispose of it for use on other lands to which such waters may be conveyed; but it must appear that the neighboring stream is not depleted, either directly or indirectly.[38]

27. **Waste or diffused surface waters.**—Waste waters are such waters as are run off upon and over the surface of the land after the water has been used for irrigation and are of a temporary and fluctuating character, dependent wholly upon the artificial application of water to the soil. These waters are not the subject of appropriation in the sense that a vested right may be acquired as against the landowner. The landowner may stop the waste, as it is his duty to do, and give the lower claimants the natural flow of the stream, or he may, by lateral ditches upon his own land, carry the waters which would otherwise waste to other parts of his land.[39]

[37] Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408; La Jara C. & L. S. Ass'n v. Hansen, 35 Colo. 105, 83 Pac. 644.

[38] Platte Valley Irr. Co. v. Buckers Irr., etc., Co., 25 Colo. 77, 53 Pac. 334. But see Comstock v. Ramsay, 133 Pac. 1107 (Colo.).

[39] King v. Chamberlain, 20 Idaho 504, 118 Pac. 1099; Burkhart v. Meiberg, 37 Colo. 187, 86 Pac. 98, 119 Am. St. Rep. 279, 6 L. R. A. (N. S.) 1104.

It appears, however, that a qualified appropriation may be made of waste and surface water escaping from the land of another as against other strangers to the source of supply, but at all times subject to the superior rights of the landowner exercised in good faith.[40]

[40] Green Valley Co. v. Schneider, 50 Colo. 606-610.

CHAPTER IV.

HOW APPROPRIATIONS ARE MADE.

A. Founded on Beneficial Use.

28. **Beneficial uses.**—Appropriations of water must be made for beneficial uses;[41] they cannot be made at large, the use to be afterwards selected as occasion or opportunity may offer;[42] but the intent to make the appropriation must include the intent to make a definite beneficial use of the water proposed to be diverted.

Generally speaking, these beneficial uses may be comprehended under the following classification: (a) domestic uses; (b) agricultural uses; (c) mining and manufacturing uses. These purposes have been generally mentioned by the constitutions of the various arid states in the order named. Appropriations for these several beneficial uses take effect and are to be enjoyed without rank or preference, but according to the rule of priority of dates hereinafter discussed; none of them yield to the others in disregard of such dates by reason of the character of the use.[43] The right of appropriation has been extended equally

[41] Ft. Morgan Land & Canal Co. v. South Platte Ditch Co., 18 Colo. 1, 30 Pac. 1032, LEADING ILLUSTRATIVE CASES.

[42] Weaver v. Eureka Lake Co., 15 Cal. 271; Toohey v. Campbell, 24 Mont. 13, 60 Pac. 396.

[43] Tartar v. Spring, etc., Mining Co., 5 Cal. 395; Rupley v. Welch, 23 Cal. 453; Windsor Res. & Can. Co. v. Hoffman M. Co., 48 Colo. 82, 89, 109 Pac. 423, 425.

to all pursuits, and it has been consistently held that the right to water by a proper appropriation for any beneficial purpose is entitled to protection in the order of the priority.[44]

29. **Preferences.**—It is true that the constitutions of some of the states provide substantially that:

"Those using water for domestic purposes shall have the preference over those claiming for any other purpose, and those using water for agricultural purposes shall have the preference over those using the same for manufacturing purposes."[45]

But these provisions have been construed to mean that this preference of uses only goes to the extent of allowing the appropriation made for the lower use to be condemned and taken upon payment of just compensation, to supply the higher use, and does not mean that the distribution of water under these priorities is made, first, to all who desire the use for domestic purposes and afterwards to those who desire the use for agricultural purposes, and, last of all, to those desiring the use for manufacturing purposes. In the matter of enjoyment and distribution there is no difference of rank or status among appropriators of water for different purposes, so long as the purpose is truly beneficial.[46]

30. **Relative economic values.**—No discrimination can be made among appropriations for beneficial uses on the basis of the relative pecuniary value of the

[44] Basey v. Gallagher, 20 Wall. 670 (U. S.).

[45] Constitution of Colorado, Art. XVI, § 6.

[46] Town of Sterling v. Pawnee D. E. Co., 42 Colo. 421-426, 94 Pac. 339, 37 L. R. A. (N. S.) 315, note; Montpelier M. Co. v. Montpelier, 19 Idaho 212, 113 Pac. 741.

use of such appropriations for the time being. This would introduce a test which, to a great extent, would destroy the property without due process of law. It has been held frequently, and never denied, that the property right in an appropriation of water for beneficial uses consists as well in the priority which attaches to it as in the volume allowed. There is no more reason, in the nature of the case, why a property right in water rights should be disturbed or taken away because someone else might make a better use of the water than to apply the same test to any other property. The maxim, "First in time, first in right," is of universal application and knows no distinction or rank in the uses for which appropriations are made if the use designed is beneficial.[47]

31. **Made by series of acts.**—Appropriations of water for beneficial purposes are initiated when the intent to take for some beneficial use is formed and is accompanied or immediately followed by some open, physical demonstration of this intent.[48] The appropriation is said to be completed upon the successful application of the water to the beneficial use intended or designed.[49] Between the formation of the intent and the final and successful application of the water to the use designed other steps or processes must intervene. Provision must be made for the construction of appliances and waterworks adapted to the control of the water, and diversion in some

[47] Basey v. Gallagher, 20 Wall. 670 (U. S.); Salt Lake City v. Salt Lake, etc., Co., 25 Utah 456, 71 Pac. 1069, 1072.

[48] McDonald v. Bear River, etc., Co., 13 Cal. 220.

[49] Thomas v. Guiraud, 6 Colo. 530; Larimer County Res. Co. v. People, 8 Colo. 614-616.

form must also be effected before the water can be applied.[50]

32. **Four steps or elements.**—The making of an appropriation thus involves at least four distinct steps or elements, viz.:

(a) The intent to appropriate for beneficial use.[51]

(b) The construction of the necessary ditches, appliances and waterworks by which it is proposed to divert the water from the stream or source of supply, or subject it to control, in some manner, within the stream or source of supply.[52]

(c) The actual diversion or control and the carriage or flow of water through the pipe, ditch or other appliance to the place of intended use.[53]

(d) The actual physical application of the water so appropriated and diverted, to the land for irrigation thereof, or to other lawful or beneficial uses.[54]

To constitute a perfected appropriation, then, there must exist the concurrence of the four elements just enumerated. The commencement of the construction of a ditch with the avowed intention of appropriating a given quantity of water from the stream, gives no right to the water unless this purpose is carried out by the diligent and active prosecution of the work to final completion of the ditch or other necessary

[50] Cardoza v. Calkins, 117 Cal. 106, 48 Pac. 1010; Parks C. & M. Co. v. Hoyt, 57 Cal. 44.

[51] Weaver v. Eureka Lake Co., 15 Cal. 271.

[52] Snyder v. Colo. Gold Dredging Co., 181 Fed. 62; Kelly v. Natoma Water Co., 6 Cal. 105.

[53] Walsh v. Wallace, 26 Nev. 299, 67 Pac. 914, 99 Am. St. Rep. 692; Ft. Morgan Land & Canal Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. 1032, 36 Am. St. Rep. 259. LEADING ILLUSTRATIVE CASES.

[54] Low v. Rizor, 25 Ore. 551, 37 Pac. 82; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. 966, LEADING ILLUSTRATIVE CASES.

appliances, the diversion of the water thereby, and, finally, the application of the water to the beneficial use intended. Actual use of the water diverted is the final test, both of the making of an appropriation and of the maintenance of the right.[55]

33. **The intent.**—The first element in the process of making an appropriation, that of intention, existing alone, can only be known to the mind in which such intent is formed, and so standing alone has no efficacy, in and of itself, whatsoever. This intent can only be evidenced to the world by some outward physical demonstration or manifestation, and must necessarily be manifest to the world upon the instance of the second element, viz.: providing the means of control and diversion. "The intent to take and appropriate and the outward act go together."[56]

The object or intent of the appropriator at the time of initiating the appropriation of water is to be considered in determining the extent of the original appropriation, and such intent is to be determined by a consideration of his acts in regard thereto, the quantity and character of the land to be irrigated, his necessities, ability and surroundings, including the character and stage of development of the country.

"As every appropriation must be made for a beneficial or useful purpose, it becomes the duty of the courts to try the question of the claimant's intent by his acts and the circumstances surrounding his pos-

[55] Clough v. Wing, 2 Ariz. 371, 17 Pac. 453; Millheiser v. Long, 10 N. M. 99, 61 Pac. 111.

[56] Ortman v. Dixon, 13 Cal. 33.

session of the water, its actual or contemplated use and the purposes thereof."[57]

34. **First physical act.**—Furthermore, it is obvious that the first thing to be done in providing the means of control or diversion which can be seen by the neighborhood at the place selected is the making and marking the location of the proposed waterworks by actual survey and the staking of the line or location of headgate, canal or reservoir. This is a physical act and demonstration which is included within the definition, and has, both with and without statutes to that effect, been recognized as the initial physical act in making an appropriation. The phrase used in the definition above cited is, "some open physical demonstration." These words are very general and just as fully describe the operation of surveying and laying out a ditch as they do the excavation of an artificial channel or the placing of a headgate or other appliance necessary to effect the diversion of the water.[58]

35. **Statutes requiring notice.**—It is true that most of the arid states have passed statutes for the purpose of giving constructive notice to the world of such intention, either before the actual work of construction is commenced or after the initial act evidencing the necessary physical demonstration has been performed, but these statutes do not change the substantive law as to what is first required to be

[57] Power v. Switzer, 21 Mont. 523, 55 Pac. 32; Barnes v. Saborn, 10 Nev. 217; Rodgers v. Pitt, 129 Fed. 932; Kirk v. Batholomew, 3 Idaho 367, 29 Pac. 40; X. Y. Irrigating D. Co. v. Buffalo Creek Irr. Co., 25 Colo. 529, 55 Pac. 720; same case, 9 Colo. App. 438, 49 Pac. 264.

[58] Conger v. Weaver, 6 Cal. 548.

done in making appropriations of water for beneficial uses.

These statutes provide for the posting of notices and the filing of statements of claim with the recorder of the county in which the proposed construction is to be situated, or with the State or Hydraulic Engineer; but these requirements are not held to be in the nature of conditions precedent to the making of an appropriation, but simply for the better manifestation to the world of the intent and to preserve prima facie evidence of the performance of the initial acts required.[59]

36. **Rights acquired by things done.**—The acquisition of a water right by appropriation has always consisted in things done, as building ditches, diverting water, and raising crops upon land irrigated by the water so diverted, rather than in the posting of notices, the filing of claims, or the making of any public records whatsoever. Indeed, these things are, by consensus of authority, but secondary or prima facie evidence of the titles theretofore acquired or initiated by the formation of the intent and the physical acts performed in manifestation thereof.

37. **Legislation cannot affect substantial rights.**—Since the law concerning the acquisition of water rights by appropriation, including the methods by which such appropriations were made, was established by common consent prior to any legislation on the subject, and this law was recognized by Congress and the highest courts in the land as already in full force and efficacy when legislation began, it is not

[59] Wells v. Mantes, 99 Cal. 583, 34 Pac. 324.

competent for either the constitutions or laws of any of the arid states to establish new foundations or employ different principles or substantially different methods even in making appropriations of water for beneficial purposes; but it must remain that the method of making appropriations is by the voluntary and unrestrained diversion and use of the water from the public streams for beneficial purposes.

All that legislation can do or effect is to regulate the use after the appropriation is acquired by means of appropriate police regulations made for that purpose.[60]

As has been said, "The test of appropriation is the ultimate application of water to the beneficial use intended" and the method of diverting, controlling or carrying the water or making such application is immaterial,[61] provided the rights of other appropriators be not unnecessarily interfered with by the method of diversion adopted. The right to appropriate water must be exercised within reasonable limits.[62]

Thus, water may be caused to overflow the banks of a stream by the crudest kind of a dam, without any ditch or headgate whatsoever, and so overflow and flood the adjacent lands. Or water may be stored in the bed of the stream for months and afterwards diverted or run down the channel of the stream to

[60] Larimer County Res. Co. v. People, 8 Colo. 614.

[61] Lower Tule, etc., Co. v. Angiola W. Co., 149 Cal. 496, 86 Pac. 1081; Charnock v. Higuerra, 111 Cal. 473, 44 Pac. 171, LEADING ILLUSTRATIVE CASES; Cascade Co. v. Empire W. & P. Co., 181 Fed. 1011; Thomas v. Guiraud, 6 Colo. 530.

[62] Fitzpatrick v. Montgomery, 20 Mont. 181, 50 Pac. 416, 63 Am. St. Rep. 622.

distant ditches and means of diversion. The appropriation is complete when the flooding occurs in one case or when the successful impounding has occurred in the other case.[63]

38. **Subsequent steps in making appropriations.**—Following the initial step in "the physical demonstration of the intent to take," whether such step be making the survey, or commencing the excavation or construction, the actual construction of the waterworks, the diversion of water thereby and its application to the beneficial use intended, must be accomplished in orderly sequence before the intent is realized or the appropriation completed, so as to entitle the appropriator to the protection of the law in the enjoyment of his property thus acquired.

39. **The test—Beneficial use.**—Where the water is used for irrigation, the appropriator is only entitled to the amount of water that is necessary to irrigate his land by making a reasonable use thereof.[64]

40. **Excessive diversion.**—Excessive diversion of water for any purpose cannot be regarded as a diversion to a beneficial use. The maxim of law which one is bound to respect while availing himself of his right is, *sic utere tuo ut alienum non laedas* (so use your own that you harm not another's).[65]

41. **Capacity of appliances.**—If the capacity of the flume, ditch, canal or other means of carriage or

[63] Thomas v. Guiraud, 6 Colo. 530, 533; Larimer County Res. Co. v. People, 8 Colo. 614-616.

[64] New Mercer Ditch Co. v. Armstrong, 21 Colo. 357, 40 Pac. 989; Hough v. Porter, 51 Ore. 318; Roeder v. Stein, 23 Neb. 92, 42 Pac. 867.

[65] Huston v. Bybee, 17 Ore. 140, 20 Pac. 51; Farmers', etc., Co. v. Riverside Irr. Dist., 16 Idaho 52, 102 Pac. 481; Sterling v. Pawnee Ditch Ext. Co., 42 Colo. 421, 94 Pac. 339.

diversion of water is greater than is necessary to irrigate the lands of the appropriator or to supply the object in view in making the appropriation, he will be restricted to the quantity of water needed for the beneficial purpose for which the appropriation was made.[66]

42. **Extent of appropriation.**—The appropriator, however, is entitled not only to his needs and necessities at the time of making the appropriation, but to such other and further amount up to the capacity of his ditch as may be required for such extended cultivation of his lands as he had in view at the time of making the appropriation, provided such application is made within a reasonable time.[67]

B. Appropriator Must Be Diligent.

43. **Diligence—The necessity for.**—These several steps or processes in the making of appropriations must be taken and exercised with diligence in order to preserve the right initiated by the formation of the intent to appropriate and the performance of the first physical act to manifest that intent, under the beneficent rule of the doctrine of relation.[68] The diligence which the law requires in making an appropriation is that "constancy or steadfastness of purpose or labor which is *usual* with men engaged in like enterprises, who desire a steady accomplishment of their designs; such assiduity in its prosecution as

[66] Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Weldon Valley D. Co. v. Farmers Pawnee Can. Co., 51 Colo. 545, 119 Pac. 1056; Bailey v. Tintinger, 122 Pac. 575 (Mont.).

[67] Seaweard v. Pacific Live Stock Co., 49 Ore. 157, 88 Pac. 963; White v. Todd's Valley Water Co., 8 Cal. 443.

[68] For doctrine of relation, see § 46 and following.

will manifest a bona fide intention to complete it within a reasonable time." The lack of that diligence which the law requires results, on the other hand, in the failure to perfect the appropriation sought to be made, as of the date when the first step was taken to secure it, where the rights of other appropriators intervene between the inception of the particular claim and the time of its completion.[69]

There is no statutory rule of diligence which marks the limit of time for the construction of irrigation works. Each case must be determined, as to the diligence used in the construction of the waterworks and in the application of the water diverted to the beneficial use intended, in the light of the circumstances surrounding that particular enterprise. It is a question of fact and must be determined from the evidence in each case.[70] In some cases a year has been held to be an unreasonable time,[71] in other cases as high as ten years was held not to be unreasonable.[72] The diligence which the law requires is the same which entitles one to be considered "diligent in business," when applied to the ordinary affairs of life by which a man gains subsistence for himself and family.

44. **Diligence to be adapted to actual condition of settler.**—Diligence must also be considered with reference to the condition of the settler upon the public

[69] Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550; Moyer v. Preston, 6 Wyo. 308, 44 Pac. 845; New Loveland, etc., Co. v. Consolidated, etc., Co., 27 Colo. 525, 62 Pac. 366, 52 L. R. A. 266.

[70] Sieber v. Frink, 7 Colo. 148, 2 Pac. 901, LEADING ILLUSTRATIVE CASES; Seaweard v. Pacific Live Stock Co., 49 Ore. 157, 88 Pac. 963.

[71] Cruse v. McCauley, 96 Fed. 369.

[72] Rodgers v. Pitt, 129 Fed. 932.

domain who has taken up land, and is redeeming the same by cultivation and other improvements and providing for the permanent reclamation of the land by irrigation, all at the same time. It is to be observed, also, that the settler, as a rule, is not engaged in a financial enterprise in which he has abundant capital at his command; that, while he is effecting his settlement and "proving up" his land, for which he is allowed under different land laws from two to thirteen years, he, as a matter of fact, adds a few acres in cultivation each year until the whole is brought under cultivation. So in the development of his water right necessary to the permanent cultivation of the land, he need not, and the law does not require that he should, go forward faster in such development than the necessities of his land require from year to year. And if he has successfully completed the application of the water to all his land at the time that he has completed the cultivation of the whole, it would seem that he has exercised that diligence which his circumstances require and his necessities demand, and has, therefore, satisfied the law.

45. **Same subject.**—It is not a theoretical diligence that the law requires; it is a practical diligence suited to the circumstances of the case. The ditch company or corporation constructing the waterworks is assisting the settler in developing, standing by to furnish him with water as fast as the same is needed, and can only go as fast as the settler permits. All depends upon the improvement of the land itself and undoubtedly there should be no hard and fast rule about either the construction of the ditch or the

formal diversion of the water within any given time. The difficulties attendant upon the settlement of a new country, including the lack of facilities, the actual needs for the priorities for which the appropriation was made, and even lack of capital for doing business, must be considered in this connection. These constitute the natural obstacles in the way of rapid development.[73]

C. The Result of Diligence—The Rule of Relation.

46. **Operation of rule.**—When diligence has been employed in the construction of the waterworks, the diversion of water and the application thereof to the beneficial use intended, the time or date from which the appropriation takes effect is, under the rule of relation, the initial date of commencement of the enterprise, the date of the first act in the physical demonstration of the intent to take and appropriate.[74] This rule of relation back becomes important in connection with the determination of the relative rights of rival appropriators. Justice required its adoption, in order that those who sought to make bona fide appropriations of water might be protected during the time they were diligently perfecting their appropriations against those claimants who initiated their rights at a later time, but crowded their construction to completion and diverted water at an

[73] Sieber v. Frink, 7 Colo. 148, 2 Pac. 901, LEADING ILLUSTRATIVE CASES; Taughenbaugh v. Clark, 6 Colo. App. 235, 244, 40 Pac. 153; Hall v. Blackman, 8 Ida. 272, 68 Pac. 19; Water Supply & Storage Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 Pac. 496; Union Mill & Mining Co. v. Dangberg, 81 Fed. 73-87, LEADING ILLUSTRATIVE CASES; Rodgers v. Pitt, 129 Fed. 932; Barnes v. Sabron, 10 Nev. 217.

[74] Union Mill & Mining Co. v. Dangberg, 81 Fed. 73, LEADING ILLUSTRATIVE CASES.

earlier date. The question at what date the right accrues as between rival claimants was first before the courts in Conger v. Weaver. The court said:

"But, from the nature of these works, it is evident that it requires time to complete them, and from their extent, in some instances, it would require much time; and the question now arises, at what point of time does the right commence, so as to protect the undertaker from the subsequent settlements or enterprises of other persons. If it does not commence until the canal is completed, then the license is valueless, for after nearly the whole work has been done, anyone, actuated by malice or self-interest, may prevent its accomplishment; any small squatter settlement might effectually destroy it. But I apprehend that, in granting the license which we have presumed for the purpose before us, the State did not intend that it should be turned into so vain a thing but designed that it should be effectual for the object in view; and it consequently follows that the same rule must be applied here to protect this right as in any other. Possession and acts of ownership are the usual indications of a right of property, and these must be judged according to the nature of the subject matter. * * * In the case of constructing canals, under the license from the State, the survey of the ground, planting stakes along the line, and actually commencing and diligently pursuing the work, is as much possession as the nature of the subject will admit, and forms a series of acts of ownership which must be conclusive of the right."[75]

[75] Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528.

"First in time, first in right," is the fundamental maxim or rule by which the relative rights of appropriators of water for beneficial uses from the public streams have always been determined. This rule was adopted by the miners and settlers from the time of the very earliest settlement of the country.[76]

In the concrete application of the maxim, however, it is necessary to establish a test as to what constitutes or fixes the "time" which is the "first." This the law does by prescribing that the date of commencement of work upon the structures and waterworks by which the diversion is to be effected is the date which is to be taken as controlling, in defining the phrase, "First in time, first in right."[77]

47. **Definition.**—This doctrine of relation is based upon a fiction of the law, whereby the first of a series of acts necessary to complete the particular transaction is taken for the completed transaction, so that the title acquired relates to the first act of the series.[78] This doctrine is not peculiar to the law of irrigation. Here, too, as in most other cases where the fiction has been resorted to, the rule is no longer fictitious, but has been made a reality by statute.

[76] Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113.

[77] Gibson v. Chouteau, 13 Wall. 92 (U. S.); Sieber v. Frink, 7 Colo. 148, 2 Pac. 901, LEADING ILLUSTRATIVE CASES; Nevada, etc., Co. v. Kidd, 37 Cal. 282, 311; Woolman v. Garringer, 1 Mont. 535; Water Supply & Storage Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 Pac. 496; Kimball v. Gearhart, 12 Cal. 27.

[78] Bouvier, Law Dictionary, title, Relation.

CHAPTER V.

WATER AND WATER RIGHTS AS PROPERTY.

48. **Ultimate source of title.**—In considering the subject of property in water rights acquired by appropriation, the preliminary inquiry of the original proprietorship of the public waters subject to appropriation is raised, and this involves the further inquiry as to how private titles in the use of water accrue to the private appropriator. The latter inquiry we have already answered in part by showing how appropriations are made, but have not hitherto considered whence the title came to the private owner when his private ownership attached by the beneficial use. This question has not been settled by uniformity of decision in the several states; we therefore proceed to analyze the subject upon fundamental principles.

There have been and still are two theories of ownership of or title in the public waters subject to appropriation upon which the advocates of each base the private title or property right of the appropriator, viz.: (a) from the government of the United States, as the original proprietor;[79] (b) from the state in which the stream or other source of appropriation is located. The latter theory is the popular one and

[79] Act of Congress, July 26, 1866, U. S. Rev. Stats. (1878), § 2339; Act of Congress, July 9, 1870, U. S. Rev. Stats. (1878), § 2340; Broder v. Natoma W. & Mining Co., 101 U. S. 274; Jennison v. Kirk, 98 U. S. 453.

has been asserted with more or less distinctness in the constitutions,[80] statutes and decisions[81] of nearly all of the arid states, it being asserted that the stream and the waters flowing into it are the property of the state and by the constitutions dedicated and set apart by the state for private appropriation.

This theory we hold to be untenable and shall endeavor to show both by the reason of the thing and by authority that appropriations of water are made by private persons directly from and with the consent of the original proprietor, the federal government.[82]

49. **Original titles—Land and water.**—In the vast arid sections of the United States all the land, together with all the innavigable streams, originally and up to fifty years ago constituted an unbroken and unsevered public domain of which the federal government was the proprietor as well as the sovereign.

The Constitution of the United States provides, Article IV, § 3, clause 2:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

It was, therefore, originally within the power of the government to convey the land and water rights constituting the public domain separately and to make provision for the future private acquisition

[80] Constitution of Colorado, Art. XIV, §§ 5 and 6; Constitution of Wyoming, Art. II, § 31; Art. VIII, § 1.

[81] Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487; Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918, LEADING ILLUSTRATIVE CASES.

[82] Winters v. United States, 207 U. S. 564, LEADING ILLUSTRATIVE CASES.

of separate titles thereto by grant or dedication to separate persons in severalty and for different beneficial purposes.[83]

50. **Lands.**—Subsequently, presumption and homestead laws in various forms were passed by Congress by which the lands proper were disposed of to settlers, without providing affirmatively in respect to the water rights which ordinarily would have become appurtenant to the lands so acquired. But from the beginning of such settlement of the lands in the arid parts of the public domain settlers asserted the right to divert the waters of the streams for beneficial uses and to acquire property and estates therein separate from the land. This practice and assertion of right was acquiesced in and recognized by both the Congress[84] and the courts,[85] as founded in the law of necessity applicable to the arid parts of the country.

51. **The Acts of Congress of 1866 and 1870.**[86]—We have already considered the force and effect of these acts of Congress for another purpose, the purpose of showing the consent of the government to making, and allowing to be made, appropriations of water from the innavigable streams for beneficial uses, or at all.[87] We now again recur to these acts of Congress for the purpose of showing the ownership and assertion of ownership of the government as to these waters. All the authorities and legal theories concur in basing the right of appropriation upon the acquies-

[83] Howell v. Johnson, 89 Fed. 556.
[84] Acts of Congress, 1866, 1870. See § 51.
[85] See cases cited, § 48.
[86] U. S. Rev. Stats. (1878), §§ 2339, 2340.
[87] See §§ 13, 14.

cence of the government, expressed in these acts, in the use and appropriation of waters by the early settlers and squatters upon the public domain.[88] This involves the admission of the government as the owner, else its acquiescence in the acts of the settlers would be a matter of no legal consequence.

The reply made to this conclusion is that, while the government of the United States originally owned the springs and streams within the public domain, it parted with its title to the states upon their admission severally into the Union, by acceptance of the constitutions of the states when admitted, containing an assertion of title on the part of the states to the waters of the territory embraced within the respective state boundaries. This position arises from a confusion between the ideas of *proprietorship* and *jurisdiction* and from making ownership equivalent with power to regulate. The simple formula is, the United States owns the public waters until appropriated and those which remain unappropriated,[89] while the state, as such, has jurisdiction and police power over all kinds of property in the state, including property in water rights and appropriation.[90]

52. **Desert Land Act.**—Subsequently, by the Act of March 3, 1877, known as the Desert Land Act,[91] Congress provided that the waters of the innavigable

[88] Irwin v. Phillips, 5 Cal. 140; Mallett v. Uncle Sam G. & S. M. Co., 1 Nev. 188, 90 Am. Dec. 484; Thorp v. Freed, 1 Mont. 651.

[89] Atchison v. Peterson, 20 Wall. 507 (U. S.); Benton v. Johncox, 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107.

[90] United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690; Walker v. Marks, 17 Wall. 648 (U. S.).

[91] Fed. Stats. Ann. (1905), pp. 392-397.

streams "shall remain and be held free for appropriation and use of the public for irrigation, etc." This is not only language of dedication of the waters to a separate use from the lands, but the force of the words "shall remain" imports a dedication from the beginning, a dedication in the nature of a gift inuring to the benefit of settlers as they should appear and come in proper relation to the thing dedicated, no grantee *in esse* being necessary to the validity of same.[92]

53. **Water rights appurtenant.**—As riparian rights depend upon the original conveyance of the land with its appurtenances, which include the use of the water as it flows through the land,[93] so water rights, by diversion and appropriation, originated and were made possible by the original separation of the use of the water from the land through which it flows, and by its dedication to appropriation and beneficial uses, by the government, the proprietor of the public domain before any of the lands of the arid region had been conveyed to settlers or private owners.[94]

This view of the case accords with and furnishes a legal basis of title to water rights by appropriation and relieves from the necessity of asserting the untenable doctrine, so often maintained, that the title to the waters of the innavigable streams within a state passes under the proprietorship of such state, by virtue of the Enabling Act of Congress and the admission of the state upon the ratification of its

[92] Hough v. Porter, 51 Ore. 318, 98 Pac. 1083; U. S. v. Winans, 198 U. S. 371, 381; Town of Pawlet v. Clark, 9 Cranch 292 (U. S.).

[93] Bardwell v. Ames, 22 Pick. 333 (Mass.).

[94] See Acts of Congress, cited in notes 79 and 84 on pp. 41 and 43.

constitution by Congress,[95] or by surrender of proprietorship on the part of the United States by the Congressional Acts of 1866, 1870 and 1877.[96]

54. **Riparian rights.**—The general rule as to the riparian proprietor is that, although his rights to the stream running through his land or bordering upon it are appurtenant to the land, yet it is within the power of the owner of specific lands to sever the appurtenant water right from the particular land and parcel out land and water in such manner as he chooses, provided he does not injuriously affect the general rights of property of other riparian proprietors to the waters of the same stream.[97]

55. **Appropriation rights.**—The water right by appropriation likewise is in its nature appurtenant to the land to be irrigated, the mill to be operated, or other real property with which the beneficial use is connected, and in a conveyance of the land it passes under the term "appurtenances" where such is the intention of the parties.[98]

It is entirely in practical accord with the conditions surrounding water rights by appropriation in the arid West that the land and appurtenant water should represent severable property rights to a much greater extent than the riparian land and water rights can be segregated at the common law. A complete severance thereof is a necessity, and such is

[95] Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. 258, LEADING ILLUSTRATIVE CASES.

[96] United States v. Rio Grande Dam & Irr. Co., 9 N. M. 292, 51 Pac. 674.

[97] City of Paterson v. East Jersey W. Co., 74 N. J. Eq. 49, 70 Atl. 472.

[98] King v. Ackroyd, 28 Colo. 488, 66 Pac. 906; Simmons v. Winters, 21 Ore. 35, 27 Pac. 7, 10.

the law. The federal government, while still proprietor of both the land and the water of the public domain, did so segregate the land and the water and make separate conveyance of each, by deed in the one case and by dedication in the other.[99]

The original title to the water right in the appropriator thus accrues, not from purchase or grant, but by operation of law.[1] It arises by the joint operation of the dedication by the original owner or trustee of the public domain or common property of the country, the federal government, and of the actual diversion and use of the consumer, authorized by the sovereign of the country and proprietor of the soil.

56. **Rights acquired by appropriation are property.**—Property is the right of a person to a thing and consists in the right of use or enjoyment of the thing and the disposal and transfer of the same right to others. Rights to the use of water acquired by appropriation come within this definition. Indeed, the term "right" itself, when used in this connection, imports a property right, and carries with it all the elements of property.[2]

While the right of property attaches to the appropriation itself, it also extends, as affecting the element of value, to the priority of the appropriation as well as its volume;[3] that is, to the relative possession of the claimants, by the application of the fundamental maxim, "First in time, first in right."

[99] Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. 472, 484-485.

[1] Hough v. Porter, 51 Ore. 318, 98 Pac. 1083; Eddy v. Simpson, 3 Cal. 249.

[2] Gould, Waters (2d ed.), § 234; Strickler v. Colo. Springs, 16 Colo. 61.

[3] Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278.

57. **Relative rights of appropriators.**—Both the first and last appropriator in a series of appropriations have property rights in such appropriations, but, obviously, the first and intervening appropriations have relatively more value than the last.

The right of the first appropriator is fixed by his appropriation and when others locate upon the stream or appropriate the water, he cannot enlarge his original appropriation or make any change in the channel, the place of diversion, or the character of the use, to their injury.[4]

Each subsequent locator or appropriator is entitled to the water flowing in the same manner as when he located, and may insist that the prior appropriators shall be confined to what was actually appropriated or necessary for the purposes for which they intended to use the water.[5]

58. **Extent of rights.**—Of course, it is a familiar doctrine that the water of a stream, while flowing in the stream, cannot be directly subject to the possession and dominion of man, and is, therefore, not property; that the right of property does not attach to the corpus of the water; that water running in its natural course cannot become the subject of private ownership.[6] The property right of appropriation consists chiefly in the right to divert and use water from the source of supply at a certain place for a

[4] Nevada Water Co. v. Powell, 34 Cal. 109; Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. 765.

[5] Handy D. Co. v. Lauden Irr. Canal Co., 27 Colo. 515, 62 Pac. 847; Lobdell v. Simpson, 2 Nev. 274; Baer, etc., Co. v. Wilson, 38 Colo. 101, 88 Pac. 265.

[6] Kidd v. Laird, 15 Cal. 161, 179-180, 76 Am. Dec. 472; Parks Canal & M. Co. v. Hoyt, 57 Cal. 44.

definite time and in a certain volume and order of priority. As we have seen,[7] the diversion of the water is the act of taking possession of so much of the water as is necessary for the beneficial use intended, and such possession or occupancy, when rightfully taken as to other appropriators claiming for the same purpose, is the realization of the right to take upon the completion of the title thereto. Water rights depend for their birth and continued existence upon use.[8]

The appropriation does not segregate the waters in the stream and does not even entitle the appropriator to the control of the given volume apart from the use intended and the existing necessity for the use. The property right acquired by the appropriation is not in the corpus of the water, but in the incorporeal right of diversion and use, and the right itself is an incorporeal hereditament.[9]

The right is usufructuary: it is a right to divert and use water belonging to the stream and does not attach primarily to the body of the water in the stream.[10] So far as the property right attaches to the substance or volume of water, it so attaches after the diversion is effected, when the water has been reduced to possession or a quasi-possession by segregation from the stream and the holding and carrying of it in reservoir, ditch or other artificial appli-

[7] See § 32.

[8] Fort Morgan Land & Canal Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. 1032, LEADING ILLUSTRATIVE CASES; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582-588.

[9] Wyatt et al. v. Larimer & Weld Irr. Co., 18 Colo. 298.

[10] Eddy v. Simpson, 3 Cal. 249; Saint v. Guerrerio, 17 Colo. 448, 30 Pac. 335.

ance for its physical control and direction. The corpus of the water itself when reduced to possession becomes personal property, and is subject to purchase or sale like other chattel property.[11]

59. **Water rights real estate.**—Since water rights for irrigation are necessarily used upon or in connection with land, they are considered in a general sense to constitute easements in the ditch and appurtenant to the land upon which the water rights are used and come fully within the definition of an incorporeal hereditament, viz., "a right issuing out of a thing corporate, whether real or personal, or concerning or annexed to or exercisable within the same."[12] The water right, being in its nature and use annexed to the realty, and being a perpetual right, is, therefore, an incorporeal hereditament, and a part of the freehold estate.[13] True, this right may be severed from the land to which it was first attached by original appropriation and use and annexed to other lands, to which it then in turn becomes appurtenant.[14] Water rights by appropriation, being thus considered and treated as real estate, may be conveyed and are required to be conveyed in the same manner as the land itself.[15] The water right, although annexed to land for use, being subject to be severed and annexed to other land, is an independent property right and may be conveyed separate from the land.[16]

[11] People v. Blake, 19 Cal. 579; Bear Lake, etc., Co. v. Ogden City, 8 Utah 494, 33 Pac. 135.

[12] 2 Blackstone, Commentaries, p. 20.

[13] Hill v. Newman, 5 Cal. 445.

[14] Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298-306, 36 Am. St. Rep. 280.

[15] Barkley v. Tieleke, 2 Mont. 59; Hayes v. Fine, 91 Cal. 391.

[16] Travellers' Ins. Co. v. Childs, 25 Colo. 360.

60. **Methods of conveyance or transfer.**—Since, as we have seen, water rights may be acquired by appropriation, either by ditch companies or by natural persons, either individually or as tenants in common, so they may be sold and conveyed by methods appropriate to the character of the title by which they are held; but in whatever form they are conveyed, it is always either as real estate or as an interest in real estate. Generally stated, water rights may be sold and conveyed in the following ways, as collected from the authorities dealing with the sale or other disposal of water rights:

(a) Where a ditch or canal is owned either by a corporation or an individual, water rights in such ditch may be conveyed by deed or contract describing certain definite water rights or a certain fractional part of the whole appropriation.[17]

(b) The sale and transfer of the entire ditch and its appropriations may be made by deed conveying the whole ditch and its appurtenances and appropriations to another individual or ditch company.[18]

(c) In the case of a mutual ditch company, where consumers of water for irrigation purposes own the stock in the ditch, water rights may be conveyed by the transfer of the stock representing the water rights in accordance with the charter and by-laws of the corporation.[19]

(d) Water rights may also be conveyed by the sale of land and its appurtenances where the right

[17] La Junta & L. Canal Co. v. Hess, 6 Colo. App. 497.

[18] Cache la Poudre Irr. Co. v. Larimer & Weld Res. Co., 25 Colo. 144, 71 Am. St. Rep. 123.

[19] Combs v. Agricultural D. Co., 17 Colo. 146, LEADING ILLUSTRATIVE CASES.

has been attached to the land by use and has remained unsevered.[20]

61. **Change of point of diversion, and of place and character of use of water.**—While water rights by appropriation are property of the class described as incorporeal hereditaments and in the nature of appurtenances,[21] it is well established that the water may be changed to a different beneficial use from that for which the appropriation was originally made,[22] may be diverted from the stream at a different point,[23] and applied at a different place of use.[24] This right to change the point of diversion of water and to change the place and character of its use is an incident to the right of property in the appropriation, and this right has been recognized and allowed from the beginning of the practice of irrigation in this country without statutory authority originally. But several states later enacted statutes regulating the method of effecting such changes in the point of diversion and in the place and character of the use.[25] The statutes so enacted are held to be strictly remedial, the right to change being inherent in the property right.[26] The change of place of use may be made even from one watershed to another.[27]

[20] Bessemer Irr. D. Co. v. Wooley et al., 32 Colo. 437, 442.

[21] § 59, above.

[22] Strickler v. Colo. Springs, 16 Colo. 61, 26 Pac. 313, 25 Am. St. Rep. 245.

[23] Kidd v. Laird, 15 Cal. 161, 186.

[24] Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257.

[25] Colo. Rev. Stats. (1908), § 3226 and following. Cal. Civil Code, §§ 1412-1415.

[26] Cache la Poudre Irr. Co. v. Water Supply Co., 29 Colo. 469, 475; Lower Latham D. Co. v. Bijou Irr. Co., 41 Colo. 212, 93 Pac. 483; Wadsworth D. Co. v. Brown, 39 Colo. 57.

[27] Coffin v. Left Hand D. Co., 6 Colo. 443.

62. **Limitation of right to change.**—The right to effect such changes is subject to the qualification that they do not injuriously affect the rights of others making appropriations from the same stream, and this qualification has been in force as a part of the law on the subject with and without the statutes.[28]

This qualification may also be said to be the survival of an element pertaining to the doctrine of riparian rights.

63. **Rule as to what constitutes injury.**—While the rule is that a change of point of diversion or a change of place or character of use may not be permitted to work injury to other appropriators from the same stream, just what constitutes such injury in the eyes of the law has not been fully defined so as to furnish a definite rule in practice for all cases. The whole question is one of fact.[29] It may be stated generally, however, that any substantial difference in the flow of the stream and the supply of water in the stream at the headgate of the objecting ditch-owner caused by the proposed change, so that the objecting ditch-owner cannot divert water in the same time and amount after such change as he could before, will constitute an injury to him of which the court will take notice in rendering the decree allowing such change, so that such change may either be refused altogether or allowed upon conditions such as will protect other appropriators from the injury suffered.[30]

[28] Fuller v. Swan River P. M. Co., 12 Colo. 12, 16; Strickler v. City of Colo. Springs, 16 Colo. 61; Hill v. Standard Min. Co., 12 Idaho 223, 85 Pac. 907.

[29] Lower Latham D. Co. v. Bijou Irr. Co., 41 Colo. 212.

[30] Wadsworth D. Co. v. Brown, 39 Colo. 57, 88 Pac. 1060.

64. **Burden of proof.**—But the petitioner desiring change of purpose or locus of use or of point of diversion must show, and the burden of proof is upon him in all cases to show, that there will not be an actual diminution of water in the stream to which other appropriators are legally entitled, by reason of such proposed transfer.[31]

65. **Greater diversion never allowed.**—The one fixed rule upon this subject is that no greater diversion must be allowed at the new point of diversion, either as to time or quantity, than was made at the old point of diversion, and this provision is either expressly or impliedly a part of every such decree.[32] The objection most frequently made is that there will be less return seepage water to the river above the headgate of the objector's ditch after the proposed change is made than before, whereby the objector's supply will be less than formerly.[33] This objection, however, involves the entire complex matter of return waters to the river throughout its whole course at different seasons of the year, and because of temporary conditions of weather and climate, it is difficult to arrive at any practical conclusion in all cases and impossible to fix any definite rule as to such incidental effects as may arise from the greater or less seepage of waters returning to the river under different conditions.

66. **Greater acreage served no test of right or in-**

[31] New Cache la Poudre Irr. Co. v. Water Supply & Storage Co., 49 Colo. 1, 111 Pac. 610, LEADING ILLUSTRATIVE CASES.

[32] Cache la Poudre Irr. Co. v. Larimer & Weld Res. Co., 25 Colo. 144, 53 Pac. 318.

[33] Vogel v. Minnesota Canal & Res. Co., 47 Colo. 534, 107 Pac. 1108.

jury.—It is no test either of the right to change a water supply from one point of diversion to another, from one place and purpose of use to another, or of injury to other appropriators, that a larger acreage will be served by the same water supply after the change than before, because the law encourages the highest and most economical use of the water that is possible and the application of the water actually appropriated to the largest possible use.[34]

[34] Cache la Poudre Irr. Co. v. Larimer & Weld Res. Co., 25 Colo. 144.

CHAPTER VI.

EXTINGUISHMENT OF WATER RIGHTS.

67. **Various ways in which water rights may be lost.**—Water rights, after having been legally acquired by appropriation, may, as we have seen, be sold and transferred from one owner to another and from one place and character of use to another; they may also be lost to the owner, be extinguished as a property right, and lapse into the general water supply by abandonment; or, without the extinguishment of the right, the title may be lost to the original owner and transferred to another by adverse user, prescription and estoppel; and the title may also be taken from the owner under certain circumstances as provided in the acts of eminent domain of the various states, just as in the case of other private property.

68. **Abandonment defined.**—Abandonment, as applied to water rights, is a voluntary or intentional giving up of the right intended to be relinquished, evidenced by an immediate and permanent cessation of the use and enjoyment thereof. "It implies some act of relinquishment done by the owner without regard to any future possession by himself or by any other person, but with intention to abandon."[35]

69. **Intention to abandon.**—As the making of an appropriation consists in the intent to appropriate, accompanied by a physical demonstration of that in-

[35] Bouvier, Law Dictionary, title, Abandonment.

tent, so abandonment, which is the converse of appropriation, consists in the intent to abandon coupled with immediate and permanent cessation of all physical demonstration in relation to the claim or maintenance of the right.[36] It is, therefore, said that abandonment operates instanter, that is to say, it takes place and is perfected immediately upon the definite formation of the intent to abandon coupled with the simultaneous cessation of the use.[37]

70. **Non-use not abandonment.**—On the other hand, non-use, of itself, without the intention of the owner to relinquish his rights, does not constitute abandonment. And non-use may continue indefinitely when there is no intention to abandon and no rights of others arise by prescription or estoppel against the old rights so fallen into disuse.[38] Neither is there any presumption from non-use in favor of abandonment. The presumption is that one having a valuable right will not lightly or without consideration abandon or relinquish it.[39]

71. **Non-use may raise a presumption of intent.**—Non-use of the water right, however, for an unreasonable length of time may raise the presumption, not of abandonment, but of the intention of the owner to abandon. This is a presumption of intent arising from action or want of action in relation to the subject matter of the intent, but such presumption may be explained or rebutted by evidence to the contrary and the owner of the water right may testify directly

[36] Utt v. Frey, 106 Cal. 392, 39 Pac. 807, LEADING ILLUSTRATIVE CASES.
[37] Nichols v. Lantz, 9 Colo. App. 1, 5, 47 Pac. 70.
[38] White v. Nuckolls, 49 Colo. 170, 112 Pac. 329.
[39] Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. 1047.

as to his intent in the matter as against his own acts which tend to raise the presumption of the intent to abandon.[40]

Furthermore, there is no presumption of intention to abandon, and hence no abandonment, however long the lapse of time during which the water has fallen into disuse, if the use is resumed before others have made or acquired some rival claim to the water right.[41]

72. **Analogy to rule of diligence.**—There is a similarity in principle between the application of the rule of diligence in the acquisition of water rights and the effect of the lapse of time of the non-user of an appropriation in relation to the question of abandonment. In both cases reasonable diligence and a reasonable use of the property acquired are necessary. Water rights depend both for their birth and continued existence upon user. But what is reasonable in this connection is to be determined by the facts and circumstances surrounding the particular case, as disclosed by the evidence then applicable.

73. **Burden of proof.**—The party alleging abandonment must sustain the burden of proof and must establish the fact affirmatively by clear and unequivocal evidence.[42]

Non-user may be shown only for the purpose of ascertaining the intention of the parties, and it must

[40] Dorr v. Hammond, 7 Colo. 79; Sieber v. Frink, 7 Colo. 148, LEADING ILLUSTRATIVE CASES; People v. Farmers' Highline Canal & Res. Co., 25 Colo. 202.

[41] Beaver Brook, etc., Co. v. St. Vrain, etc., Co., 6 Colo. App. 130, 40 Pac. 1066.

[42] Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. 1047.

appear from the evidence that there was a leaving and relinquishment of the claim, with no intention of reclaiming or making any further use of it.

74. **Effect of abandonment.**—An abandonment inures to the benefit of the community at large or rather to the benefit of the general source of supply and cannot be made in favor of some particular individual, but the water right so abandoned operates to the benefit of other appropriators junior to the abandoned right; or, if there be no such junior appropriators, then anyone can make an appropriation by application or beneficial use, as in the first instance.[43]

75. **Adverse user and prescription.**—One, by making adverse use of water rights under color of title, may, as against the owner, acquire title thereto himself if his adverse use runs continuously for the full prescriptive period.[44]

When a water right has fallen into disuse and no effort has been made to re-establish the use within a reasonable length of time, and other appropriators from the same source of supply have entered into the enjoyment of the water right so fallen into disuse, claiming it as their own, it is said that the new user establishes a prescriptive right in the claimants thereof, and, conversely, establishes an estoppel against the former owner whereby he is prevented from reasserting his ancient right against the new owners.[45]

[43] Colo. Land & Water Co. v. Rocky Ford, etc., Co., 3 Colo. App. 545, 34 Pac. 580.

[44] Lower Latham D. Co. v. Louden, etc., Co., 27 Colo. 267, 60 Pac. 629.

[45] Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554; Broadmoor, etc., Co. v. Brookside, etc., Co., 24 Colo. 541.

76. **Prescription and appropriation distinguished.**—Prescription presupposes a grant; appropriation presupposes a dedication of the public waters to beneficial uses by the federal government, the original proprietor of the public domain. Prescription transfers an existing title from one to another; the appropriator acquires a new title by the act of appropriation. Appropriations must be completed within a reasonable time; adverse user ripens into a prescriptive title only after the expiration of the common law period of twenty years or such time as may be fixed by statute. Prescription does not run against the government but against the former private owner. Appropriation is a right acquired directly from the government with its acquiescence.[46]

77. **Estoppel.**—The rights of an appropriator may be changed or lost by acquiescence and estoppel. Any conduct on the part of the appropriator which leads others to change their position on the faith of representations made by him, will prevent his afterwards asserting his original rights, if such assertion is contrary to his own express representations or to the true interpretation of his own conduct. Particularly is this true where one makes valuable improvements upon the land or builds ditches to carry the water without objection from the original owner.[47]

[46] Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453.

[47] Morrison v. Winn, 18 Utah 15; Parke v. Kilham, 8 Cal. 78, 68 Am. Dec. 310.

CHAPTER VII.

STATUTORY REGULATION OF WATER RIGHTS.

A. Adjudication.

78. **Titles to water rights not of record.**—Water rights for irrigation and other beneficial uses are initiated and perfected by physical acts performed by the appropriator and consumer, as we have seen, and not by patent, deed or other paper title. These titles are therefore not found upon the public records in the first instance, are not required to be exhibited under the registry laws and therefore cannot be abstracted and the chain of title shown as in the case of lands and tenements generally. Titles to water rights must be established and the chain of title collected from other evidence, as in a case on trial.

79. **Sworn statements of record.**—True it is, that the statutes in most of the arid states now provide for the filing of statements of claim, either in the county records or in the office of the State Engineer or Hydraulic Engineer of the state, there being an officer under that or some similar name as the chief administrative officer in the distribution of water according to existing rights for beneficial uses. But these statements amount at best to but prima facie evidence of right and while they constitute a convenient method of preserving evidence, they go no further and do not constitute the ultimate or final record evidence of title.

80. **Early methods of determining titles in water rights.**—In the beginning some effort was made to settle titles by contract, by the decision of local administrative officers, justices of the peace, and the like,[48] but these methods were lacking in authority, comprehensiveness and power of enforcement, and the subject soon passed into the courts of general jurisdiction under their inherent and constitutional powers for the determination of "all cases in law and equity."

In most instances these cases in court arose upon local controversy between two or more contending parties without extending to the whole stream or watershed, and were usually classed as chancery proceedings and tried or decided on the equity side of the court.

81. **Early methods inadequate—Statutory provisions.**—It was soon realized, however, that these decrees, while settling the immediate trouble between the contending parties, were not sufficiently comprehensive and the jurisdiction was not sufficiently broad to settle or determine titles and rights generally as to water rights derived from the same stream or watershed, although much of the law of irrigation was settled in these early cases, many of which we have cited above.

82. **Difficulties to be remedied.**—Under these circumstances, two fundamental difficulties existed as to the full use and enjoyment of the water rights acquired by individual appropriation, viz.:

(a) No uniform system of adjudication had been

[48] Hill v. Newman, 5 Cal. 445.

provided whereby a record title could be made of all water rights appropriated from the same water supply.

(b) No official authority existed for the orderly distribution of water rights, even when established.

These two fundamental difficulties in the way of the regular and lawful enjoyment of rights of appropriation were taken up by all the states and territories in the arid regions and statutory systems of regulation of water rights created, by which both classes of difficulties were proposed to be met, and as the event has shown, have largely been met and obviated.

83. **Legislation.**—This legislation consisted of two branches or general divisions of the subject: (a) provisions for general adjudication and decrees fixing the relative rights of all appropriators within the same territory or water district; (b) provisions for complete official supervision and distribution of the public waters of the whole state upon the basis of priority as determined by the decrees in equity or rendered in such general adjudication.

In nearly all the states and territories where irrigation has been practiced, this dual system of legislation for the protection and regulation of the use of water rights has been adopted. Space will not permit us to examine the legislation of all these different states, but the legislation of the state of Colorado being a fair type, it will be taken as the basis of the present discussion, referring the student to the statutes and decisions of the various states, as occasion may arise. We shall not go into the full details

of even this legislation, but only attempt to sketch its general features and principles.

It is to be borne in mind, however, that any and all legislation affecting either the acquisition of rights or their adjudication is declaratory and regulative and cannot extend to either the taking away or the granting of such rights, these rights depending in the first instance not upon legislation, but upon the actual use of the water by the early settlers.[49]

84. **General statutory adjudication of water rights—Colorado—Procedure.**[50]—The statutes of Colorado enacted in 1879 and 1881 are typical of this method and, we think, as complete and comprehensive as any and may be taken for illustration of this subject for our present purpose. The state of Wyoming furnishes an exception to this general plan. Adjudications are made in the first instance in that state by the board of control, with right of review, however, by the courts of general jurisdiction.[51]

These statutes provide for the filing of a petition in a court of competent jurisdiction by the party interested upon the stream or in the district sought to be adjudicated, praying for a general adjudication of water rights upon said stream or within such district. Notice is given by posting and publication and, so far as practicable, by personal service.

85. **Proceeding—Quasi in rem.**—A special proceeding is thus instituted which is not governed by the Civil Code or acts regulating procedure gener-

[49] Platte Water Co. v. Northern Colo. Irr. Co., 12 Colo. 525; Larimer County Res. Co. v. People, 8 Colo. 614.

[50] Colo. Rev. Stats. (1908), §§ 3276, 3284, and following.

[51] Farm Inv. Co. v. Carpenter, 61 Pac. 258, LEADING ILLUSTRATIVE CASES.

ally, but is considered a special statutory proceeding. The proceeding is spoken of as one quasi in rem, but is limited in its scope, applying only to the special subject of the adjudication of rights to the use of water for irrigation, as the titles of such statutes indicate.

86. **Proofs taken before court or referee.**—All parties within a given watershed or in the same water district, who claim water rights from the same stream being adjudicated, are required to come into the proceeding and offer proofs in support of their several claims, and all parties are also permitted to offer proofs controverting the claims and evidence made by others in the same proceeding. The proceeding is thus made a mutual and general proceeding for the settlement of the rights of all claimants of water rights in the same territory.

87. **Decrees.**—When the proofs of all parties have been received and the claims of all duly considered, a general decree is required to be entered whereby the relative rights of all are said to be adjudicated. This decree must set forth the findings of fact upon which appropriation is based and the decree given for the amount of water required to supply the purpose for which the appropriation has been made, provided that before the decree is entered, the application of the water to the use intended shall have been made or be in immediate course of actual execution. The date of the appropriation fixed by the decree is required to be the date of the commencement of the enterprise, provided diligence has been used, and this date is embodied in the decree. Num-

bers also are given to the several decrees for the different appropriators, so that the order of numbers indicates the priorities and the relative standing of the appropriators, as do also the dates given to the several appropriations determined by the general decree.

88. **Decrees, force and effect.**—These decrees are not considered as the initiation or grant of any new rights whatsoever; they are held to merely embody the perpetual evidence of and give paper title to rights already acquired and in existence, being analogous in that respect to the equity action for the quieting of titles to real estate generally.[52]

Decrees cannot be awarded under this statutory proceeding, except for the amount of water actually applied to beneficial use.[53] The decree fixes the maximum within which the appropriator is allowed to make his diversion for necessary uses.

These rights as well as the decrees evidencing them extend to the tributaries of the main stream,[54] flood waters coming down dry canons into the main stream,[55] or through subterranean channels, waste and seepage waters,[56] and also waters used in irrigation returned to the main stream, all being part of the principal stream, and controlled by these decrees.

89. **Decrees, when final.**—A decree is considered to be interlocutory for two years, after which it may

[52] New Mercer D. Co. v. Armstrong, 21 Colo. 357.

[53] Ft. Morgan Land & Canal Co. v. South Platte Ditch Co., 18 Colo. 1, LEADING ILLUSTRATIVE CASES.

[54] Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513.

[55] Denver, Texas & Ft. Worth R. R. Co. v. Dotson, 20 Colo. 304.

[56] Buckers Irr., Mill. & Imp. Co. v. Platte Valley Irr. Co., 28 Colo. 187.

be reconsidered for cause shown by parties within the district, and after a period of four years by parties outside the district. After two years all persons within the district are held bound by the decree, and after four years all parties outside the district and on the same stream are held to be barred from further litigating matters settled by the decree.[57]

B. Administration.

90. **Authority for distribution wanting.**—The other difficulty formerly existing as to the enjoyment of rights by the appropriators, even when the rights were ascertained and defined by decree in chancery, was one of execution or rather of administration. Claimants to water rights had the right to go to the stream each for himself and divert water to the amount of their claims or needs for actual or supposed beneficial uses. There were likely to occur and often did occur physical collisions and breaches of the peace upon the banks of the stream and near the points of diversion of rival claimants.

91. **The first plan adopted.**—The distribution of water among those entitled thereto in the order of their priorities was first regulated by community by-laws, agreements, and common consent and administrated by a neighborhood water-master according to the wishes and directions of the community. But agriculture having spread itself over all the plains and invaded the valleys of the streams and the parks in the mountains, with appropriations from every river, creek, and rivulet for that and

[57] Ft. Lyon Canal Co. v. Ark. Valley, etc., Co., 39 Colo. 332.

other beneficial purposes, the subject soon outgrew the neighborhood and community and became a matter of state and public concern. This state of things, of course, naturally suggested the interposition of the police power of the state, for the regulation of the distribution of the water of the public streams to those entitled thereto.[58]

92. **The statutory method of distribution.**—Accordingly, in most if not all of the arid states, statutes have been passed contemporaneous with the adjudication statutes, providing for the administration of these rights and the decrees evidencing them, so that the water of the public streams and other sources of supply might be distributed by an impartial authority according to the very right of the matter and in accordance with the findings and adjudications of the decrees.

93. **Water commissioners.**[59]—In the development of this administrative system, water commissioners were first provided for, the water commissioner being an officer whose duty it is to attend to the distribution of water within a certain limited and described district. These districts unfortunately were arbitrary in their boundaries and not made to conform either to the main streams or the tributaries thereof, but the main stream or watershed was divided into several districts with arbitrary lines like the boundaries of a county or township.

94. **Division engineers.**[60]—To remedy this initial mistake, superintendents of irrigation or division

[58] White v. High Line Canal Co., 22 Colo. 191.
[59] Colo. Rev. Stats. (1908), §§ 3353-3427, and following.
[60] Colo. Rev. Stats (1908), § 3335, and following.

engineers were then provided for, whose jurisdiction extended throughout the entire watershed, embracing whatever number of districts was found in such watershed. The division engineer was given authority over the water commissioners, so that the water of the entire stream or watershed could be administered as a unit through the water commissioners instead of in a fragmentary way, as when the districts were entirely independent of each other. It was made the duty of the division engineer to procure certified copies of all decrees pertaining to all the districts and to re-tabulate those decrees according to the dates of priority given by them, so that the water rights might be administered with reference to their priorities throughout the whole division, regardless of the districts within and for which the decrees were given.

95. **State engineers.**[61]—Crowning all this administrative system, the state engineer was provided, whose jurisdiction extends over all the state and all the streams of the state, whose powers are superior to those of the water commissioners and the division engineers and whose orders these subordinate officers are required to obey, it being expressly provided that the water commissioner shall be subject to the orders of the division engineer, the division engineer and the water commissioners both likewise subject to the orders of the state engineer.

96. **The police power of the state.**—Justification of the creation of this authority for the regulation of water rights and the distribution of water to those

[61] Colo. Rev. Stats. (1908), § 3321, and following.

entitled thereto is found in the police powers of the state.[62] As we have seen, the state has no title to the water, either before or after its appropriation. Water rights do not arise by grant, but accrue to the appropriators from the original proprietor, the United States Government, by reason of the dedication of the waters to appropriation and of the acts and facts in connection with the making of the appropriation by the actual use of the water by cultivators of the land and persons engaged in that or other beneficial industries; but the state having a limited sovereignty and jurisdiction over persons and property within the state, it has the power of regulation and the power to prescribe rules for the adjudication of water rights and for the distribution of the water to those entitled when such adjudication has been had, as well as to regulate the users of water themselves in their intercourse with each other and to maintain peace and prevent unseemly breaches of the peace in the inevitable strife for precedence in the enjoyment of this most valuable kind of property in an arid country.[63]

[62] Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513.
[63] McLean v. Farmers, etc., Co., 44 Colo. 184.

CHAPTER VIII.

THE CONSTRUCTION AND CORPORATE MANAGEMENT OF WATERWORKS.

A. Physical Structures.

97. **Ditches and appliances.**—The waters subject to appropriations for beneficial use are found in the state of nature in some of the forms or conditions which we have enumerated above, but in order that the usufruct in the water may be utilized for the purpose intended, it is first necessary to capture the water and subject it to the control of the consumer for the irrigation of his lands more or less remote from the source of supply. The water must be diverted from the stream and carried or conveyed by gravity flow or lift, or both, to the place of use.[64] The simple and typical method of diversion consists of a ditch or canal from the stream; the headgate appliances in the ditch at the river bank for regulating the diversion and inflow to the ditch or canal; a dam in the stream at and immediately below the head of the ditch to raise the water in the stream so as to properly supply and control the diversion.

98. **Canals.**—These canals necessarily vary in length and size with the conditions of the country and the territory to be supplied, varying from a mile or less in length to many miles, the larger ditches

[64] Charnock v. Higuerra, 111 Cal. 473, 44 Pac. 171, LEADING ILLUSTRATIVE CASES; Thomas v. Guiraud, 6 Colo. 530.

being adapted to supply water to a large territory distributed by private ownership into many farms. It is also necessary to construct small ditches called laterals, taken from the main ditch, in order that the water may be carried and diverted to the lands or farms in private ownership, so that these lands severally may be irrigated, cultivated and agricultural crops produced. The distribution of water to the lands by means of these small ditches or laterals constitutes the application of water to the intended use, and only when this is done is the appropriation, initiated by the commencement of work on the main canal, completed.

99. **Reservoirs.**—Where it is desired to utilize water in the streams or otherwise available, when not immediately needed, reservoirs or artificial lakes are constructed either in the mountain gorges or in depressions upon the plains for the storage of such water, not immediately needed, to be subsequently drawn off in times of need and scarcity of water supply, for the irrigation of lands. These supplies may be either used to supplement the earlier irrigation enjoyed by means of ditches diverting water directly for irrigation or may be applied in the irrigation of new and other lands not otherwise supplied at any time of the year with water for irrigation. Most frequently, however, in practice, storage reservoirs are used to furnish additional supplies of water in the later part of the irrigation season to lands already partially supplied.

100. **Dams.**—Dams in running streams are employed not only to control the diversion of water

into the heads of ditches and for the purposes of overflowing lands along the margins of the streams without ditches, but also in the construction of reservoirs upon the streams themselves, making the bed or channel of the stream itself the bottom of the reservoir. This is done where the stream flows through a narrow gorge or channel and the banks of the stream rise abruptly to a considerable height close to the river, particularly where the bottom lands along the stream above the narrow gorge open out into glades or parks, thus affording a large capacity for the storage of water. In such cases, a dam is built across the channel to the height necessary, with steel headgates built in solid masonry to regulate the discharge of the water. Surplus water is then stored there, at all times allowing enough water to go through the dam or the wasteway connected therewith to supply prior needs. The mere storing of the water by means of the dam in such cases dispenses with actual diversion in the first instance in making the appropriation;[65] afterwards the water is taken out through the discharge gates into the channel of the river and carried thence to some ditch or place of diversion further down the stream to the lands sought to be irrigated thereby, and thus the appropriation is deemed to be complete, as in other cases where the construction of diversion ditches and the actual diversion of the water itself, before it is impounded, is effected.

101. **Eminent domain.**—Rights of way for canals and ditches and the land embraced in reservoir sites

[65] Larimer County Res. Co. v. People, ex rel., 8 Colo. 614.

may be taken by proceedings in condemnation, over and upon private lands, by those engaged in the construction of such ditches and reservoirs for irrigation purposes, upon payment of just compensation to the owner. The right of eminent domain applies in such cases upon the ground that irrigation waterworks are charged with the public use and are inherently ways and works of necessity. This right of eminent domain is given by the Bills of Rights and the statutes of most, if not all, of the arid states.

102. **Liability for damages.**—The owners of ditches and reservoirs are liable to the person or persons injured for damages resulting from a break in the ditch or from leakage in the ditch or reservoir where injury to adjacent lands is suffered from seepage or overflow. In such cases it is not necessary to allege or prove negligence in the construction or operation of the ditch or reservoir. The statutes, generally at least, throw upon the owner the burden of an insurer against damage to others, caused by the breaking or escape of water from his ditches and reservoirs. He must so use his own that others will not be injured thereby.[66]

B. Ownership and Control of Canals and Waterworks.

103. **Early history of irrigation works.**—In the early history of the construction of irrigation waterworks, the enterprises were small and were undertaken by one or a few individuals as tenants in common; these were enterprises where the lands

[66] Sylvester v. Jerome, 19 Colo. 128; Middelkamp v. Bessemer Irr. D. Co., 46 Colo. 102; Fletcher v. Rylands, 37 L. J. Ex. 161 (Eng.).

to be supplied lay near the streams and were of limited extent. When these lands were exhausted, and it became necessary to invade and reclaim the lands upon the higher levels and farther away from the streams to accommodate the growing settlement, larger works and larger enterprises were necessary, and so the construction of irrigation works necessarily passed into the control of large private corporations or irrigation companies.

104. **Private corporations.**—Private irrigation companies, for the building and operation of either canals or reservoirs or both, are usually organized under the statutes of the states in which they exist, according to the general law. These corporations carry on two methods of operation: (a) as quasi-public carriers; (b) as mutual ditch companies, but have a common form of organization under the general corporation laws of the states.

105. **Quasi-public carriers.**—In this form, the stockholders of the corporation are interested in the construction of the ditch and its water rights and appropriations, without being interested in the lands to be irrigated. In such cases, companies sell or hire water rights and privileges to the consumers of water for the irrigation of the lands to be supplied. The ditch company is considered a public service corporation and is subject to like obligations and restrictions as carriers of merchandise or companies carrying on a warehouse business, at least in so far as the regulation of rates of sale or hire of water rights is concerned, and are governed in the conduct of their business to a considerable extent by the

statutes enacted for the protection of the public and the regulation and control of public utilities.[67]

106. **Mutual ditch companies.**—In this form, the stockholders of such a corporation are interested in common in the construction of the ditch, the ownership and use of the appropriations and the cultivation of lands lying under the ditch. The distribution of water is made according to the stock held by such stockholders respectively, for their private uses and for the irrigation of their lands severally. Such corporations are mutual ditch companies and their members have common and similar interests. Generally speaking, they may make such by-laws for their own mutual government and business as they shall see proper, without being subject to public regulation or control. The carrier of the water and the consumer are substantially one.[68]

107. **Appropriations acquired by ditch companies.**—Ditch companies may appropriate water under the same rules and regulations as individuals, but such appropriations are acquired by these corporations as trustees for their stockholders and particularly for the consumers to be supplied by such appropriations. Decrees of courts adjudicating the priorities thus acquired are made and allowed to the ditch companies, leaving the distribution of the water so appropriated to the internal management of each corporation. In bringing and defending suits likewise, the corporation represents the stockholders

[67] Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582; Merrill v. Southside Irr. Co., 112 Cal. 426.

[68] Combs v. Agricultural D. Co., 17 Colo. 146, 31 Am. St. Rep. 275, LEADING ILLUSTRATIVE CASES.

and consumers in most cases and must protect their interests without the necessity of joining all such stockholders or consumers as parties to the suit.[69] Where the water rights, however, are not represented by the stock of the corporation but have been conveyed by deed or contract, then the holders of such rights are not necessarily represented by the corporation, and in many forms of action must be individually brought in, as necessary and indispensable parties.[70]

108. **Irrigation districts.**—Irrigation districts may also be organized under special laws enacted for that purpose. These irrigation districts must not be confused with "water districts," mentioned in a previous chapter, being the territory within which the water commissioner as a public officer exercises jurisdiction. The irrigation district here under consideration is formed by the resident owners of lands in certain localities for the purpose of constructing and acquiring waterworks and water rights for the irrigation of their lands. The dominant feature of this plan lies in the power of electors of the district to vote and issue bonds secured upon lands embraced in the territory selected, in the amount sufficient to raise the sums of money required for the acquisition of water rights and the construction of the waterworks desired. These organizations are considered as quasi-municipal corporations and are organized in the same general manner as school districts. Directors are selected by the votes of

[69] Farmers' Independent Ditch Co. v. Agricultural D. Co., 22 Colo. 513.
[70] Brown v. Farmers' Highline Canal & Res. Co., 26 Colo. 66.

the qualified electors living in the district. These directors constitute a board who have management of the property and control and regulate the distribution of water therefrom in form and manner required by the statutes under which they act.[71]

The Wright Act of California.—The original of this form of organization was provided by the California statute passed about 1887 known as the Wright Act, and similar statutes have since been passed in most of the arid states.[72]

BIBLIOGRAPHY.

Gould on Waters (2nd ed.); *Weil* on Water Rights in Western States (3rd ed.); *Kinney* on Irrigation and Water Rights (2nd ed.); *Farnham* on Water and Water Rights; *F. H. Newell* on Irrigation in the United States. Opinion of Judge Hawley in the case of Union Milling & Mining Co. v. Dangberg, 81 Fed. 73, 122.

[71] Gen. Laws of Cal. (1889), pp. 436, 548; Colo. Rev. Stats. (1908), §§ 3440, 3494.

[72] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112.; Alfalfa Irr. Dist. v. Collins, 46 Neb. 411; In re Madera Irr. Dist., 92 Cal. 296, 27 Am. St. Rep. 106.

LAW OF MINES AND MINING

BY

WILLIAM EDWARD COLBY, LL.B.*

CHAPTER I.

THE HISTORY OF THE ORIGIN AND GROWTH OF MINING LAW IN THE UNITED STATES.

1. **Historical outline.**—A complete understanding of mining law as it exists in the United States is only possible through a knowledge of the underlying historical reasons, for one finds different laws in force in different parts of the United States. The original colonies inherited the common law of England, and the general rules of law governing the operation of mines and quarries and their tenure became part of the jurisprudence of this country. The regalian doctrine, that the crown was entitled to all mines of precious metals, was of no practical importance to the original states, because comparatively little mining outside of coal mines and quarries was carried on in them. Another cause operating to prevent the creation of a radical system of mining jurisprudence

* Lecturer on the Law of Mines, University of California; formerly special lecturer on the Law of Mines, Leland Stanford Junior University. Assistant editor: "Lindley on Mines" (3rd ed.). Contributor to scientific periodicals.

in those states was the absence of any public domain. They and not the federal government owned all land within these original thirteen states.

As soon as new territory owned by the federal government was added, it became necessary for Congress to pass laws providing for its control and disposition. The necessity for the enactment of mining legislation arose with the acquisition of zinc, lead, and copper lands on the public domain in some of the states of the Middle West. In the early part of the last century a system of leasing the mineral lands of the public domain was instituted, but in 1850 this was abandoned, the years of its operation having proved it to be radically defective. The Congressional Acts of 1846, 1847 and 1850 provided for the outright sale of mineral lands, "and laid the foundation of a more substantial prosperity," to quote the presidential message of the time. A new order of things was about to arise.

With the acquisition of the vast territory included within California, Colorado, Oregon, Nevada, Idaho, Montana, Wyoming, Utah, New Mexico, Arizona, the Dakotas, and Washington, and through the discovery of the precious metals, a new era in mining began. It was here that the American Mining Law, so-called, had its birth. It was a unique growth, an institution that was characteristically American. It embodied in its origin the principles of democratic government that were the outgrowth of the old New England town meeting. Hordes of people of all nationalities, but predominantly Anglo-Saxon, rushed to the new El Dorado. The Mexican law of mines previously

in force had been abolished by military proclamation. Some sort of law was imperatively necessary, otherwise individual might, and continual shedding of blood in the lawless attempt to establish rights, would have been the inevitable result. It rested with the federal Congress to pass such laws, since the mining took place on the public domain. But Congress was many weeks' journey distant. The states might have acted in the absence of federal legislation, but neither the federal government nor the states saw fit to enact a code of laws. To fill the void the miners legislated for themselves; they organized mining districts, met in convention, and passed their own governing laws and rules. This was turning back a page in history to the parliaments held by the tinners of Devon and Cornwall, centuries previous. In time these rules came to have a remarkable uniformity. Later they were recognized by the courts and the legislatures of some of the states. From the discovery of gold in 1848 until the Federal Act of 1866 the acquisition, control, and operation of mineral lands in the West was carried on entirely in accordance with the rules and customs of miners as established in the mining districts.

Various acts providing for the control and disposition of the mineral wealth of the West had been suggested from time to time. There was a plan to lease on a royalty basis, and the idea of paying off by this means the enormous public debt inherited from the Civil War met with great favor in the East. The long failure of Congress to act on this question was probably due to a fear on the part of the western

interests as to what the legislative mill might grind out if the question were advanced for final settlement. Finding, however, that there was a strong tendency to enact some sort of legislation which might perhaps prove detrimental to the mining interests of the West, Senator William M. Stewart of Nevada, aided by other western senators, drafted the Congressional act which is now known from the year of its passage as the Act of 1866. This act affected lode or quartz claims primarily and was followed by the Placer Act of 1870. Experience demonstrated the shortcomings of these acts and Congress superseded them by what is known as the Federal Mining Act of 1872, which, with modifications, is still the law governing the acquisition of mineral lands on the public domain of the West.

The mining laws of the United States are divided into three classes embracing different territory. The classification is based on the historical reasons just outlined.

2. **The mining laws of the original states.**—The federal government acquired no public lands in these states, nor in certain other states carved out of territory owned by some of the original states. These states are Maine, Vermont, New Hampshire, Connecticut, Massachusetts, Rhode Island, Delaware, New Jersey, North Carolina, Georgia, Pennsylvania, New York, Virginia, West Virginia, Tennessee and Kentucky. With the exception of coal and oil mining and quarrying there has been little mining in these states of any importance, and the common law prevails. These states have their own mining laws

where they have seen fit to legislate, but such legislation is usually confined to police regulations.

Texas has a general mining law of its own which follows in the main the federal law. It can very appropriately be included in the category of the original states, since it entered the Union as an independent state owning all of the public land within its borders.

3. **The mining laws of the Middle West.**—Certain public land states in the Middle West are excepted from the operation of the general federal mining laws, either because their mineral lands were disposed of under special enactment, or because they were specifically excluded from the operation of the general laws. In Arkansas, Illinois, Iowa, Michigan, Minnesota and Wisconsin, the lands containing baser metals were ordered sold by Congress under special laws prior to the discovery of gold in California. Alabama, Michigan, Minnesota, Wisconsin, Kansas and Missouri are excepted from the operation of the general federal mining laws by special acts of Congress which have been passed at various times.

4. **The public land states and territories.**—Mining states, or precious metal states, as they are sometimes called, where the federal system of American mining law is in full operation, are California, Oregon, Washington, Arizona, Nevada, Idaho, Montana, Utah, Wyoming, New Mexico, Colorado, North and South Dakota, and a portion of Oklahoma. This same system with modifications is in force in Alaska. This system is supplemented by state and territorial

legislation expressly permitted by the federal acts and constitutes what is usually referred to as the American Mining Law.[1]

5. **The history of mining law.**—The history of mining law in the United States naturally divides itself into the following periods:

(1) From the beginning of the government to the discovery of gold in California in 1848;

(2) Discovery of gold to the Congressional Act of 1866;

(3) Act of 1866 to the Act of 1872;

(4) Act of 1872 to the present time.

6. **First period—To 1848.**—In most of the royal charters under which this country was originally settled, the grant expressly included all mines, minerals, precious stones, and quarries, but reserved one-fifth of all gold and silver ore as rent, to be delivered free of charge at the pit's mouth. These reservations were of no practical importance, however, since mines of precious metals were not discovered prior to the Revolution.

The first legislative act of the Continental Congress referring to mineral lands was the ordinance of May 20, 1785, looking to the disposal of lands in the western territory. One-third of all gold, silver, lead and copper mines was reserved to the government. This reservation was not based on economic reasons, but was merely the result of the practice followed by the crown, to whose rights the American Confederation succeeded. With the adoption of the

[1] There is a special Act of Congress governing mining law in the Philippines. 32 Stats. at Large 697, amended by 33 Stats. at Large 692. See Reavis v. Fianza, 215 U. S. 16.

Federal Constitution this reservation then became obsolete.

7. **Lead and copper mines of the Middle West.**— March 3, 1807, Congress reserved from sale the lead mines in Indiana Territory, as it was then called, and the President of the United States was authorized to lease lead mines for a term not exceeding five years. No leases were made until 1822. The power of the federal government to lease land as well as to sell it was determined in the case of the United States v. Gratiot.[2] United States v. Gear[3] held that mining on public land without a lease from the government was a trespass, and the defendant was enjoined from committing waste. As a result of this litigation many leases were taken out.

The Federal Act of March 3, 1829, provided for the sale of lead mines in Missouri. The Act of July 11, 1846, ordered that the lead mines of Illinois, Arkansas, Wisconsin and Iowa be sold like other public lands. The Act of March 1, 1847, opened for sale lands near Lake Superior, Michigan, containing lead, copper and other valuable ores. The Act of September 26, 1850, repealed the Act of 1807, abolished leases and placed lands containing minerals on the same footing as other lands, giving lessees holding leases the preference as to purchase. The leasing of these lead mines had worked very unsatisfactorily and it had cost the government more to collect the royalties reserved than the revenue derived from these royalties amounted to. The Act of March 3,

[2] 14 Pet. 526 (U. S.).
[3] 3 How. 120 (U. S.).

1847, ordered the sale of lead lands in Wisconsin in the Chippewa district.

8. **Second period—1848-1866.**—From the discovery of gold in California in 1848 to the passage of the Congressional Mining Act of 1866 constitutes the second period. Marshall discovered gold in January, 1848, at Coloma, California. The treaty with Mexico was concluded February 2, 1848, and exchanged May 30th, and proclaimed July 4th, 1848. This added about half a million square miles to the United States territory, including California, Nevada, Utah, parts of Arizona, New Mexico, Colorado and Wyoming, and containing extensive and valuable mineral deposits.

February 12, 1848, following the discovery of gold and the excitement incident thereto, Col. Mason, the military governor of California, issued a proclamation "abolishing Mexican laws and customs relating to the denouncement of mines." At that time there were few known mines in California.[4]

September 9, 1850, California was admitted to the Union and September 28th the laws of the United States were extended to California. No provision was made therein for mining. Secretary of the Interior Ewing proposed an elaborate system patterned after Spanish and Mexican law, but the system was not adopted.

The early case of Hicks v. Bell[5] declared that the state owned mines of gold and silver by virtue of

[4] The effect of Col. Mason's proclamation is discussed in the New Almaden Case, United States v. Castillero, 2 Black, Reports of Supreme Court, pp. 18-371 (U. S.).

[5] 3 Cal. 219-227.

its sovereignty, but this doctrine was later abandoned.[6]

9. **Early mining districts and mining customs.**— During the early years of mining in California and other western states no statutes were passed either by the federal or state governments providing for or regulating the acquisition of title to mineral lands. The federal government was far removed and unfamiliar with mining problems. Miners, prospectors, and adventurers flocked to California from all parts of the world. The mining regions were mountainous and almost inaccessible.[7]

The miners on arriving at the diggings found no laws governing them. The necessities of the situation demanded some form of regulation to define and limit rights and to prevent lawless acts and breaches of the peace, and for the protection of life and property. Therefore, the miners themselves created their own code of laws and formulated rules, based on the customs and usages of the district. While some have claimed that these rules were the spontaneous creation of the early miners, others see in them the reflection of other mining law systems. Miners came from Mexico, South America, North Carolina, Georgia, Illinois, Wisconsin, Cornwall, Derbyshire, Germany and Austria, and all added their experience. The mining regulations were founded on the practical sense of these men and on natural equitable principles. The rules were changed and modified to suit existing conditions, and in this respect were

[6] Moore v. Smaw, 17 Cal. 199-226.
[7] Yale, Mining Claims, p. 58.

wonderfully elastic; much more so than they could have been under a general statute. These rules varied with the locality, yet underlying them all were common principles and they possessed a remarkable uniformity. In the earlier days of many camps these rules not only pertained to mining but in many cases provided a comprehensive code of laws regulating and prescribing punishment for crimes. Rude tribunals composed of miners were constituted to administer justice and determine disputes expeditiously. The death penalty was imposed in some cases for stealing a mule or other property over $100 in value. These rules and regulations originated in California, but gradually spread into the mining regions of the West, even so far east as the Missouri River, where they were adopted in a more or less varied form. They constituted the common law of mining in the West. These rules were similar in many respects to the customs of the English tin and lead miners and to the old Germanic mining customs of the Continent, except that there they were founded on immemorial usage, while here they sprang into existence over night, as it were, and the essential requirement was general recognition and observance.

In 1866 there were about five hundred mining districts in California, two hundred in Nevada and one hundred each in Arizona, Idaho and Oregon.

10. **Organization of districts and nature of regulations.**—The rules were few, plain and simple, and were adopted at mass meetings held in known places in the districts upon previous notice. One miner was elected presiding officer, another secretary and

keeper of the records of the meeting, which were turned over to the elected recorder and kept in a book of records. Each district had its own name and fixed its own boundaries, within which it had jurisdiction. The rules usually prescribed the size of the claims, the posting and recording of notices and the amount of work which was necessary to keep the possessory right alive.

11. **Judicial and legislative recognition of customs, usages and regulations.**—In 1851 the legislature of California adopted a provision in the Civil Practice Act which prescribed that the customs, usages and regulations of the mining districts should govern when not in conflict with the laws of the state. Other states followed, until these customs were recognized by the legislatures of nine western states and territories.

The courts also, independently of legislative enactment, early recognized these customs and gave them a controlling force in their decisions.[8]

In the mining district we have one of the most original and most democratic institutions that has ever sprung into existence in the United States. It is analogous to the New England town meeting and involves the principle of self-government. There was no effective state government in the early days, and the miners created their own laws. These district laws and customs became known as the American Common Law of Mines.

[8] Morton v. Solambo Copper Mining Co., 26 Cal. 527; Jennison v. Kirk, 98 U. S. 453. These cases contain interesting descriptions of the origin and growth of mining districts.

Mining customs are now practically obsolete except in remote regions like Alaska, where they sprang into existence with the same force and effect and were created by the same necessities as in the early days of California. They are still of considerable importance there.[9]

[9] Those desiring to study the miners' customs and regulations in detail are referred to a very extensive collection contained in Vol. XIV of the Tenth Census, and to Yale, Mining Claims.

CHAPTER II.

FEDERAL LEGISLATION AFFECTING MINES AND PUBLIC LANDS.

12. **The Federal Act of July 26, 1866.**[10]—This is the first general legislation on the subject of mines and was based largely on the miners' rules and customs. The Act of 1866 has been superseded by the Federal Act of 1872, but it is still of practical importance because the title to a large number of mines was acquired under it and litigation connected with these mines is still before the courts.

13. **General comment on the Act of 1866.**[11]—The Act of 1866 was somewhat crude and inadequate, but it was a step in the right direction and a positive recognition, long delayed, of the right of the miner to occupy and work on the public domain. Its important features were:

(1) All mineral lands of the public domain were free and open to exploration and occupation.

(2) Local rules were recognized and confirmed.

(3) Patent title to quartz or lode claims was obtainable.

It may seem strange that the first act applied to lode or quartz claims primarily. All mineral lands were thrown open to occupation, but lode claims

[10] 14 Stats. at Large, 251.

[11] See Jennison v. Kirk, 98 U. S. 453-458; Ivanhoe M. Co. v. Keystone Cons. Min. Co., 102 U. S. 167-173.

alone were patentable. The probable reason for this was that placer mining, at first of such importance, was on the decline, and the placer ground became exhausted in a relatively short space of time, while lode or vein mining was more permanent in its character and there was greater need of permanent security of title. Then, too, Senator Stewart of Nevada had a great deal to do with the framing of the act, and there were few placers in Nevada, while lode mining on the Comstock was of tremendous importance. The lode was the principal thing granted. The surface was merely incidental. It is important to bear this in mind, because the Act of 1872 changed this policy. The size of the surface allowed in connection with the lode varied in different districts. The lode only was located, the claims usually being staked at the ends of the lode. The location notices called for so many feet along the lode, and surface width was of minor importance.

14. **The Congressional Act of July 9, 1870.**[12]— This is commonly called the Placer Act to distinguish it from the lode law of 1866. It was an amendment to the latter act and permitted the patenting of placers on like conditions as in the case of lodes, except that no survey was necessary where the placer was taken in accordance with legal subdivisions. It also permitted subdivision of surveyed land into 10-acre tracts for location purposes and made 160-acre tracts the maximum area for a single location. It made possessing and working for a statutory period equivalent to locating. Matters relating to the pro-

[12] 16 Stats. at Large, 217.

tection and working of the claims were left to local regulations.

15. **The Act of May 10, 1872.**[13]—This act constitutes the present law in the mining states of the West. It is based on the Act of 1866, but supplements, modifies and supersedes it.

16. **Lodes.**—With reference to lodes the Act of 1872 is a radical departure from the Act of 1866. The Act of 1866 provided for the location of a certain length of vein. Surface ground was a mere incident for the convenient working of the one vein granted. The extent of the surface area was governed by local customs and the end lines of the locations were not required to be parallel. Under the Act of 1872 the miner must locate a piece of surface which includes the top or apex of the vein in order to give him any valuable rights. There is prescribed a definite maximum surface area of fifteen hundred feet in length by six hundred feet in width (three hundred feet on each side of the lode or center line of the claim). Under the old law the miner located the one lode. Under the new, he locates a piece of land containing the lode and is entitled to all other lodes the tops or apices of which are in his ground. The end lines of the claim must also be parallel. Extralateral rights are further confirmed, and cross and intersecting veins and junctions of veins in depth are provided for. The Act of 1872 added "lead, tin and other valuable deposits" to "gold, silver, cinnabar and copper" as provided for in the Act of 1866.[14]

[13] 17 Stats. at Large, 91; U. S. Rev. Stats., §§ 2319-2337.

[14] See Gleeson v. Martin White M. Co., 13 Nev. 442, for an excellent comparison of the two acts.

17. **Placer mines.**—No radical changes were made by the Act of 1872 in the law governing placers, except that an individual claim was limited to twenty acres.

18. **Miscellaneous provisions of the Act of 1872.**—Provision was also made in this act for acquiring title to lodes in placers. The amount of annual labor was for the first time prescribed by federal statute. The boundaries of mining claims were required to be marked on the ground and the contents of location notices, where recorded, were prescribed. Forfeiture of the rights of a part owner to his co-owner for failure to do his share of the annual labor was provided for. Proceedings to acquire patent to mining claims were elaborated and improved, and the mode of asserting adverse claims was prescribed. The acquisition of tunnel claims and mill sites was also provided for.

On June 22, 1874, the United States Revised Statutes were issued and these codified and consolidated the mining statutes then existing.[15]

The Federal Mining Act of 1872 is a fairly complete code, but it has been supplemented in minor respects by Congress from time to time and also in most of the western states by necessary state legislation.

19. **The American Mining Law.**—The American Mining Law is built up of:

(1) Federal statutes;

(2) State or territorial statutes, not inconsistent therewith;

[15] See §§ 2318-2346.

(3) Local rules and customs not in conflict with either of the foregoing.

The system is somewhat involved. The courts of the states and of different federal jurisdictions have rendered conflicting decisions on the same questions, but these are set at rest whenever the United States Supreme Court passes upon them, as it is the final interpreter of these laws.

20. **Land tenure in the United States.**[16]—The thirteen original states and also the states of West Virginia, Kentucky, Tennessee and Texas, own absolutely the land within their borders and each state has provided by legislation for its disposition. The public domain of the United States was acquired by cession from the original states, by purchase, and by conquest. These lands are absolutely within the control and disposition of the United States through the Department of the Interior.

21. **Grants by sovereigns.**—Within the lands thus acquired by the United States there were titles already existing in favor of private parties by virtue of grants from the previous sovereigns, Mexican, Spanish, French and English. These titles have for the greater part been recognized and confirmed by the United States. We were mainly concerned with lands derived by conquest or purchase from Mexico. For the purpose of adjusting and determining valid claims in California, a board of land commissioners was appointed by the general government, and later a court of private land claims was organized for several of the other western states. These Mexican

[16] Lindley, Mines, chap. 3; Donaldson, Public Domain, 1883.

grants are the source of title to many of our large ranchos and pueblos. Under these various grants, minerals were not excepted, unless specifically excepted in the grant itself.

22. **Sale at auction.**—The public domain was at one time sold at public auction in tracts of certain areas, but now this has been practically superseded, except in the case of small isolated tracts. This system existed principally in the Middle West.

23. **Pre-emption.**—Pre-emption claims or preference rights granted to settlers existed from early times, 1801 to 1891, when the law was repealed. These pre-emption rights were granted under various acts and gave to the prior occupant the right to purchase under certain conditions that had to do principally with entry, residence, and cultivation of the soil.

24. **Homestead.**—This is the most important mode of acquisition of agricultural land. This homestead must not be confused with the state homestead or with the homestead protection afforded husband or wife or the head of a family by many state statutes. The Homestead Act was passed in May, 1862, and has been amended several times. Under it the head of a family, who must be a citizen of the United States, files, in the United States Land Office of the district where the land is situated, an application for a tract of land not exceeding one hundred and sixty acres of non-mineral agricultural land. It must be surveyed and taken up in contiguous units of forty-acre subdivisions. A small fee is paid for filing. The occupant must live on the land and culti-

vate it for three years (five years until recently) and make final proof of having complied with the conditions of the act. All soldiers and veterans of the war were granted additional homestead tracts. The Homestead Act is most beneficent and is considered one of the best features of our land laws. It has stood the test of a half century and has not been changed in any important particular. It was the result of the experience of the country for half a century and is distinctly an original American institution.

Enlarged homesteads of three hundred and twenty acres of non-irrigable land in Idaho and other semi-arid western states are also granted. These lands are used for dry farming.

25. **Timber and Stone Act of 1878.**—This act concerns land chiefly valuable for timber or stone and which is not fit for cultivation. The grants are limited to one hundred and sixty acres and the lands must not contain gold, silver, cinnabar, copper or coal. Only one entry of this kind is allowed to each person, who must be a citizen. Originally the lands were sold for $1.25 per acre, but now they can only be purchased at their appraised value.

26. **Desert lands.**—The Act of 1877, supplemented by the Act of 1891 and other acts, permits a citizen of the United States to acquire three hundred and twenty acres of desert lands in an arid region on condition that he shall reclaim the same by bringing water on it within four years and by raising certain crops. The land must be non-mineral in character and the price to be paid for it is $1.25 per acre.

27. **Railroad grants.**—Alternate, odd-numbered sections within a certain distance from each side of a right of way of a railroad were granted by Congress as an aid to the construction of railroads shortly after the close of the Civil War. The indemnity grants extended the limits on each side of the right of way and were made in compensation for lands already in private ownership or lost to the railroads for other reasons. The lands were granted to the railroads on condition that they be sold for specified sums. Minerals (but not coal and iron) were excepted from the operation of the grant.

28. **Town sites.**—If the town is incorporated, the corporate authorities, or if it is unincorporated, the county judge enters the lands at the land office as a town site, and holds the same in trust for the inhabitants and sells them to the occupants. These lands must be non-mineral in character.

29. **Scrip.**—Valentine, Sioux Half Breed, Forest Reserve Lieu Scrip are rights given by the government to select a certain acreage of the public domain not otherwise appropriated. These rights are given in exchange for other lands desired by the government, or for services rendered. This scrip is becoming scarce and more and more valuable, since it enables persons desiring land to acquire title to it with greater simplicity than is possible by most other methods.

30. **Indian and military reservations—National forests, national parks.**—These are special reservations of land from sale and for devotion to specified governmental purposes.

31. **Coal lands.**—There are special acts of Congress governing the disposition of coal lands. They are usually sold by legal subdivisions at an appraised value.

32. **Grants to states.**—(a) Sixteenth and thirty-sixth sections are usually reserved for the states for school purposes. They are sold by the state and the proceeds appropriated to the school fund.

(b) The states also have the right to select lieu lands in place of sixteenth and thirty-sixth sections lost to them.

(c) Various grants of large acreage selected from the public domain in the states have been made for general educational, university and college purposes.

(d) Swamps and overflowed lands were also granted to many states.

33. **Land patents.**—The evidence of title from the government is called a patent. It is a written document by which the United States or a state transfers or grants title to an individual.

The patents issued for the public lands just described usually contain a reservation that mineral lands do not pass by them, and such reservation has the effect of withholding known mines, i. e., those mines known to exist at the time of the issuance of the patents. Minerals discovered in such lands subsequent to the issuance of a patent are usually the property of the patentee.[17]

[17] The Department of the Interior, Washington, D. C., issues separate circulars containing the laws and regulations governing Homesteads, Desert Lands, Timber Lands, Coal Lands, Town Sites, etc., and these may usually be had on application.

CHAPTER III.

MINERAL LANDS AND THOSE WHO MAY ACQUIRE RIGHTS TO THEM.

34. **Terms used in the statutes.**—The Act of 1872[18] provides that, "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase," etc.

United States Revised Statutes, § 2318, provides that, "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."

Section 6 of the Act of 1872, United States Revised Statutes, § 2325, provides that, "A patent for any land claimed and located for valuable deposits may be obtained in the following manner."

Section 1 of the Act of 1866 used the term mineral lands and the Act of July 4, 1866, providing for surveys in Nevada, used the language, "Lands valuable for mines." These terms are largely equivalent and are used interchangeably. It therefore becomes important to define mines, mineral lands, etc. The question is always one of fact.

"Mineral" in its broadest sense includes all inorganic substances on the surface of the earth. It is

[18] § 1, now U. S. Rev. Stats., § 2314.

customary to speak of the mineral kingdom as opposed to the vegetable and animal kingdoms. This is not the meaning of "mineral" as used in the mining acts.[19] In popular use the meaning is sometimes restricted to metallic substances, and one court even went so far as to limit it to that meaning.[20]

35. **Various tests of mineral character.**—In order to determine the question, what is mineral land, it is necessary to take into consideration the particular locality and the surrounding conditions. Are they on the whole better adapted for mining, or for other purposes?[21] There is no clearly marked dividing line between mineral lands and non-mineral lands. Lands in which minerals may be found in small quantities only, are not within the contemplation of the acts; but minerals must exist in sufficient quantity to justify expenditure for extraction and must be known to be of that character at the date of the grant. The mineral value of the land must be greater than the agricultural or other values.[22] There should be enough minerals to justify a prudent person in the expenditure of money and labor in exploitation.[23] If the land contains gold which can be secured with profit, that fact will satisfy the demands of the government as to the

[19] Northern Pacific Ry. Co. v. Soderberg, 188 U. S. 526, 530, 537.

[20] Wheeler v. Smith, 32 Pac. 784 (Wash.), overruled by State v. Evans, 89 Pac. 565 (Wash.).

[21] A good test is suggested in the case of Deffeback v. Hawke, 115 U. S. 392, 404-405. See also Ah Yew v. Choate, 24 Cal. 562, which is an early leading case.

[22] Davis v. Wiebbold, 139 U. S. 507, 521, LEADING ILLUSTRATIVE CASES.

[23] Chrisman v. Miller, 197 U. S. 313, LEADING ILLUSTRATIVE CASES.

character of the land.[24] Land is mineral in character where minerals have been found and evidence of this is of such a nature that a person of ordinary prudence will be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a mine.[25]

36. **Mineral substances.**—The following nonmetallic substances have been held to be mineral by various decisions in the United States:

Asphalt, petroleum, borax, soda (nitrate and carbonate), sulphur, alum, kaolin or china clay, mica, marble, onyx, limestone, gypsum, amber, clay (fire), building stone, and stone of commercial value, slate for roofing purposes, guano, precious stones. There are special laws for the acquisition of coal and salt lands and of salines. Lands valuable for potash and phosphates are now being withdrawn from entry by the Department of the Interior in the expectation that Congress will provide special laws governing their acquisition. Lands containing common brick clay, cement, limestone, sand and gravel are not mineral according to rulings of the Land Department.[26]

The Land Department is the tribunal charged with the determination of the character of the land preliminary to the issuance of a patent. Courts wait upon the Land Department's determination when such questions are pending before them.[27]

37. **Lodes and placers.**—Mineral lands are divided into two classes: (1) lands containing lodes or veins;

[24] U. S. v. Iron Silver Mining Company, 128 U. S. 673.
[25] Castle v. Womble, 19 L. D. 455-457 (Land Decisions).
[26] 41 L. D. 314, 39 L. D. 310.
[27] Ripinsky v. Hinchman, 181 Fed. 786, 794.

(2) lands containing placer deposits. A certain knowledge of geological conditions is essential to a complete understanding of this classification.[28]

38. **Citizens.**—Revised Statutes, § 2319, provides that mining rights may be acquired by citizens of the United States, and those who have declared their intention to become such. It is unnecessary to enter into the discussion of what constitutes a citizen. This is a matter of private international law. The intention to become a citizen is ordinarily evidenced by the filing of a declaration of intention and taking out first papers looking toward naturalization. Minors and married women are citizens qualified to locate mining claims. Domestic corporations organized under the laws of the states and territories of the United States are citizens.

39. **Aliens.**—It frequently happens that aliens locate mining claims or acquire title by purchase from locators or owners. Such a location cannot be successfully attacked collaterally on this ground by rival claimants. The United States alone can question the alien's right in a direct proceeding, termed "office found," unless the alien is applying for a patent, in which event, anyone may raise the question by way of protest.[29] Of course if a claim is once patented, aliens can acquire title by purchase where the laws of the jurisdiction permit aliens to own property. The transfer to a citizen of a claim located by an alien or the application for first papers by an alien locator validates the claim.

[28] See Le Conte, Geology, chapter on Veins; Hayes, Handbook of Field Geology, p. 109; Spurr, Geology Applied to Mining, p. 173 and following.

[29] McKinley Creek Min. Co. v. Alaska United Min. Co., 183 U. S. 563.

CHAPTER IV.

VEINS OR LODES AND THEIR LOCATION.

40. **Kinds of veins.**—The classification of veins is more or less arbitrary. There are true fissure veins, veins of segregation and replacement, intrusive dikes, contact veins, secondary enrichments, chambers and lenses, stock work, etc. Genetic theories sometimes aid in determining the identity and continuity of veins when extralateral rights are involved. Veins are supposed to have been caused in some instances by ascending mineral-bearing waters, also by descending waters, and in still other cases by lateral secretions from the country rock. Geologically, veins are usually found where there has been some stress in the earth's crust, producing planes or zones of weakness resulting in either true fissures, fractures, shear zones, cracks or brecciated zones, along which mineralizing solutions have traveled and deposited their mineral content. This has usually resulted in more or less irregular tabular masses of mineral-bearing rock, enclosed between more or less well-defined walls and usually inclined at some varying degree from the perpendicular or horizontal. In other words, this mineral mass has a more or less pronounced dip, and is usually irregular and undulating and also limited in extent.

41. **Definition of vein or lode.**—As judicially determined, a vein or lode or ledge is to be defined

not from the standpoint of the strict geologist, though his definitions afford some aid, but from that of the miners, who first made the definition. "Lode" is a form of the verb "lead." Whatever formation the miner would follow with expectation of finding pay ore, was his lode. The question is one of fact, and the peculiar character and formation of the ore deposits and country rock in the particular district where the question arises are to be considered. The designation of a lode must always have special reference to the formation and peculiar characteristics of the particular district. "Vein or lode" is the wording most commonly used in the statutes. The word "ledge" is usually interchangeable, and the word "lead," used in mining districts, is synonymous. There is no essential difference between the terms. A comprehensive definition of the term "lode" as used in the acts of Congress is found in Eureka Cons. M. Co. v. Richmond Min. Co.,[30] which is the first famous case where a comprehensive definition has been attempted:

"A lode is any zone or belt of mineralized rock lying within boundaries closely separated from the neighboring rock and includes all deposits of mineral matter found throughout a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes."

In this case the definition was applied to a zone of dolomitic limestone,—a sedimentary deposit broken, crushed and fissured. The footwall was of quartzite,

[30] 4 Sawyer 302-311 (U. S. Circ.), affirmed in 103 U. S. 839.

and the hanging wall of clay shale. The zone varied from a few inches to 450 feet wide and the mean width was 250 feet. The hanging wall dip was from 80 to 85 degrees, the footwall dip 45 degrees. Throughout the limestone there were chambers and caverns in the bottom of which were lead carbonates carrying gold and silver.

In Leadville, Colorado, were discovered blanket veins consisting of horizontal sheets of dolomitic limestone at or near the contact with overlying white porphyry. The case of Iron Silver M. Company v. Cheesman,[31] arising in that district, held that, "A lode or vein is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain."

The thickness or thinness, poverty or richness, does not affect the character of the lode. It may pinch out.[32] A lode has been defined as a valuable mineral deposit in the body of the earth.[33] The statutes should be liberally construed and should be applied to any kind of lode or vein of any quartz or rock bearing minerals of whatever kind or character or formation. The promise of the rock in place bearing minerals must be sufficient to justify the expenditure of time and money. In some districts veins are clearly defined; in others, the minerals are found in seams, narrow crevices, cracks or fissures.[34]

42. **Rock in place.**—To make a vein or lode within

[31] 8 Fed. 297, 301.

[32] Stevens v. Williams, 1 McCrary 480-488 (U. S. Circ.), 23 Fed. Cases 413, 414.

[33] Consolidated Wyoming G. M. Co. v. Champion M. Co., 63 Fed. 540-544.

[34] Same case as in note 33.

the meaning of the statutes, there must be rock in place as distinguished from "float." Rock in place is a vein or lode found in its original state or condition, in fixed and immovable rock, in the general mass of the mountain. The lode itself may be earthy or loose or friable in character and easily worked, but it is a lode still, if in place. It is to be distinguished from the wash or slide.[35]

43. **Lode claims—Deposits in place.**—United States Revised Statutes, § 2320, provides that lands containing veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, may be located as lode claims.

Ordinarily, metalliferous ores are encountered in veins of rock in place. Coal is thus found, although not metalliferous. Coal lands are sold by the government under special laws. Many non-metallic substances, such as borax, onyx, gypsum, magnesite, phosphates, gem-bearing dikes, and gilsonite, occur in lode form, i. e., in place in the mass of the mountain, between walls or defined boundaries. Some of these substances are also found as placer deposits.

For some time there was a serious question as to whether these non-metallic substances were properly taken up and located under lode or placer laws.

A very exhaustive and instructive review of the authorities is contained in Henderson v. Fulton.[36]

The conclusions there reached are that, in defining vein or lode as applicable to lode claims, we must be guided by the prevailing and common use of these

[35] Stevens v. Williams, 1 McCrary 480 (U. S. Circ.).

[36] 37 Land Decisions 652.

terms by practical miners and are not limited by strict scientific definitions, and that to constitute a lode or vein the deposit must be mineral-bearing rock in place. Each case must be determined by the peculiar situation, formation and boundaries of ore deposits or vein matter in the particular mining district where the claims involved are located.

It is now well settled that non-metallic minerals occurring in lode form are to be located as lodes.[37]

44. **Location defined.**—Location is the inception of the miner's title. It is the act or series of acts by which the right of exclusive possession of mineral veins and the surface of mineral lands is vested in the locator.[38] Location originally referred to the act of appropriating the mineral deposits under the mining laws. It came to be synonymous with the claim itself. Strictly speaking, a location refers to a single unit of ground appropriated, while the mining claim may embrace one or more locations in a group. The terms are very often used interchangeably.[39] Usually, the word "location" refers to an unpatented claim.

45. **Federal requirements.**—While the law prescribes the size of a single location, there is, in the absence of district rules, no limit to the number of claims which one may acquire by location or purchase. The federal requirements of location are:

(1) Discovery of mineral.

[37] Webb v. American Asphaltum M. Company, 157 Fed. 203; S. F. Chemical Co. v. Duffield, 201 Fed. 830.

[38] Creede & Cripple Creek M. & M. Co. v. Uinta Tunnel, Min. & Trans. Co., 196 U. S. 337, 25 Sup. Ct. 266, LEADING ILLUSTRATIVE CASES.

[39] St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 648, 649.

(2) Marking the location on the ground so that its boundaries can be readily traced.

(3) Where a record is made, it must contain certain statements. No notice is required to be posted or recorded under the federal statutes.[40]

46. **State legislation.**—Most of the public domain states have supplemented the federal requirements and have added acts essential to complete a valid location. In general, they are the following:

(1) Discovery of minerals. (Federal requirement also.)

(2) Discovery shaft to be sunk, of given dimensions, within a specified time.

(3) Posting a notice of location.

(4) Recording a notice of location.

(5) Marking surface boundaries. (Federal requirement also.)

The order of performing the acts is generally immaterial, in the absence of intervening rights.[41]

47. **Discovery.**—United States Revised Statutes, § 2320, provides that "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." The discovery need not precede the other acts of location, however, provided there are no intervening adverse rights.

In all ages and countries discovery has usually been regarded as giving the discoverer a preference or entitling him to a reward. This is to encourage prospectors in the search for minerals. In this coun-

[40] U. S. Rev. Stats., §§ 2320, 2324.

[41] Dwinnell v. Dyer, 145 Cal. 12.

try his reward is the first right to the claims he discovers and any others he may locate adjacent thereto.

A discovery is essential to the validity of a mining location and the possessory title is not perfect until the discovery of minerals has been made within the location in question. Priority of discovery gives priority of right.[42]

48. **Nature of discovery required.**—In the case of a lode claim the discovery consists of finding a vein or lode in place. The discovery of float will not do. The value of ore discovered is not usually material, especially between rival mining claimants. It need not show a profit for working.[43] It must be such, however, as will justify an ordinary miner to spend time and money to develop a claim. Where the contest is between a mining claimant and an agricultural claimant, the showing is generally required to be stronger than where the contest is between two mining claimants. The question turns on whether from the evidence the land is shown to be more valuable for mining or for agriculture.

49. **Place of discovery.**—The discovery must be within the limits of the claim and in free ground. Where a valid senior claim overlaps, the discovery in the junior claim cannot be made in the conflict area.[44]

The discovery must be the top or apex of the vein, a portion of which must be included in the boundaries.[45] Where the apex is already covered by

[42] Lawson v. U. S. Mining Co., 207 U. S. 1, LEADING ILLUSTRATIVE CASES.
[43] Book v. Justice Mining Co., 58 Fed. 106, 120.
[44] Gwillim v. Donnellan, 115 U. S. 45.
[45] Larkin v. Upton, 144 U. S. 19-21.

another location having an extralateral right, a discovery on the dip will not satisfy the law, when the discovery point is included in the extralateral right of the other claim.[46] There is a difference of opinion as to whether a discovery on the dip not within the extralateral sweep of any other claim is valid. A discovery underground, especially of a blind vein, is satisfactory.[47] It may be made by means of a tunnel, except where a state statute requires the vein to be disclosed in a discovery shaft.[48] Indications of mineral on adjoining ground are not sufficient for discovery on a claim, no matter how conclusive the indications on the adjoining ground may be. An old discovery on an abandoned or unperfected claim may be adopted. Loss of discovery by the exclusion of the discovery point when amending the claim or by allowing it to be patented in another claim is fatal and, in the absence of a new discovery elsewhere in the claim, restores the claim to the public domain.

50. **Time for marking a discovery.**—After discovery, the locator must proceed with diligence to perfect the location, by marking. Some states give a specified number of days, others give no special time. A reasonable time to perfect the location after discovery is ordinarily granted.[49] What is a reasonable time depends upon circumstances and varies in different cases.

51. **Possession pending discovery.**—A miner searching for minerals, prior to discovery, will be

[46] Bunker Hill Co. v. Shoshone Co., 33 L. D. 142.
[47] Brewster v. Shoemaker, 28 Colo. 176, 63 Pac. 309.
[48] Butte Cons. M. Co. v. Barker, 89 Pac. 302 (Mont.).
[49] Doe v. Waterloo Min. Co., 70 Fed. 455.

protected to the extent of the ground that is in his actual possession so long as he is using reasonable diligence, and some cases hold that he is protected as to his entire location.[50] A federal court has held that he will be protected only to the extent of the ground in his actual physical possession, and under this ruling it becomes a "race of diligence" as to which one of two rival locators will make the first discovery, for this will validate the entire claim of such discoverer.[51] An adverse entry, however, must be peaceable and not clandestine or fraudulent.

52. **Discovery shaft.**—There is no necessity for a discovery shaft under federal legislation, and, unless it is specifically required by state statutes, it is unnecessary. The special requirements vary in the different states and one must look to their special statutes for details. The discovery shaft is generally required to be ten feet deep and to disclose the vein at that depth, or it must be deeper, if necessary to disclose the vein. In most states any equivalent of the shaft, such as a cut or tunnel, disclosing the vein at the required depth and fulfilling the requirement as to cubic contents, is sufficient.

The purpose of the discovery shaft is twofold: (1) to demonstrate the presence of the vein, and (2) to compel the discoverer to give evidence of good faith. It must be in free ground; that is, ground which is not in conflict with any senior valid claims.[52]

Cases are conflicting in different states as to the

[50] Weed v. Snook, 144 Cal. 439, 77 Pac. 1023.
[51] Hanson v. Craig, 170 Fed. 62.
[52] Gwillim v. Donnellan, 115 U. S. 45.

effect on the location of the loss of the discovery shaft. Sometimes this happens where the land including it is inadvertently allowed to be patented in some other claim. Some cases hold that the loss of the discovery shaft invalidates the claim; others, that if a discovery is made elsewhere in the original claim before the patent issues, the claim is still valid.

The discovery shaft need not necessarily be sunk at the original point of discovery, but is ordinarily required to be on the center line or lode line. Courts have held that discovery work cannot be performed underground by extended subterranean workings from adjoining claims. In other words, the discovery shaft must not be secret, but must be on the surface where it can be readily inspected.

The time for completing the discovery work is entirely controlled by statute and is usually 60 or 90 days. The effect of failure to complete the discovery shaft as required is to render the location voidable. A subsequent locator can initiate a valid location after the statutory period has elapsed, if the first locator has failed to sink his shaft; and if he completes his discovery shaft within the time fixed he acquires a valid title to the claim, even though the first locator should complete his shaft first. Where there are no intervening rights, the completion of a discovery shaft after the statutory period by the locator perfects his title.

A discovery shaft on the boundary of two claims, so that one-half of it is in each, is not sufficient for both claims, unless its cubic contents in each claim comply with the requirements of the statutes.

53. **Posting the notice of location and its contents.** —Posting a notice on the claim is not required by the federal statutes,[53] but it is universally done. It was the first step in perfecting the location after discovery, under the local rules and customs prior to federal legislation. The notice served to warn others that that particular mineral deposit was claimed. No special form was required. The notice was simple and to the point.

Nearly all of the states have statutes requiring posting of notice. The state statutes usually require what was done under the old rules and customs. The notices are usually simple, containing the name of the locator, the date of the location, a brief description of the claim, the names of the location and of the mining district, county and state. These notices are liberally construed by the courts, as they recognize that prospectors are often illiterate. Most states require the notice to be posted at the point of discovery, and this is the natural place for posting. Usually the notice must be conspicuously posted, but courts have held that when a monument is built so as to attract attention, notices placed in cans or partially under stones to protect them from the weather may be sufficient.[54]

Some states allow a specified time to elapse after the discovery before the posting of notice is required; others allow a reasonable time; others require immediate posting. Some require a second notice to be posted after the discovery work has been performed.

[53] Haws v. Victoria Copper Mining Company, 160 U. S. 303.
[54] Gird v. California Oil Co., 60 Fed. 531-536.

In some states the statutes are quite elaborate and many facts must be stated in the notice of location. For instance, the number of feet claimed each way on the vein from the point of discovery, and also the width of the claim, must be stated. The local statutes should always be consulted with reference to the special requirements relating to the posting of a notice.

54. **Recording of the notice of location.**—The federal law does not require any notice to be recorded,[55] but it provides[56] that if a notice is recorded it shall contain (1) "the name or names of the locators," (2) "The date of the location," (3) "* * * A description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." This is the minimum requirement. It is the custom everywhere to record the notice, and most states make it obligatory. Usually the notice recorded is a copy of the notice posted. In some states it must be verified or sworn to, and Idaho requires that the affidavit of the locator be attached, setting forth the fact of his citizenship, that the ground is open to location, and that he has done his discovery work.

The purpose of the record is to give notice to the world of the existence and situs of the claim. A posted notice is local and temporary—the recorded notice is more permanent and lasting, and it serves to put others on notice as to the locus of the claim. It is the initiation of the title on the county records and the basis of proceedings to obtain a patent.

[55] Haws v. Victoria Copper Mining Company, 160 U. S. 303.
[56] U. S. Rev. Stats., § 2324.

55. **Description of the claim.**—Most prospectors and miners are not technically trained, and, as the law is designed to encourage miners, it is administered on lines of common sense and the statutory requirements as to the descriptions of the claims have been liberally construed. The claim should be so described that any person with reasonable intelligence having a copy of the record can go out and find the claim and ascertain its boundaries. However, courts have been liberal in sustaining descriptions.[57] Very often the descriptions contain references to other mines in the vicinity. Such descriptions are satisfactory. They often refer to streams, rivers, mountain peaks, trees, shafts, mills, etc. Erroneous calls in the location certificate are overlooked, and the actual boundaries and monuments on the ground control, provided that the erroneous description does not mislead anyone. A description reading northerly and southerly, when the claim lies easterly and westerly, might be so misleading as to invalidate the claim. The consideration of good faith is an important element, and the giving of actual notice to others is the main consideration.

56. **Marking the location on the ground.**—United States Revised Statutes, § 2324, provides that "The location must be distinctly marked on the ground so that its boundaries can be readily traced." § 2320 provides that a lode mining claim "* * * may equal but not exceed 1,500 feet in length along the vein or lode. No claim shall extend more than three hundred feet on each side of the middle of the vein

[57] Hammer v. Garfield M. & M. Co., 130 U. S. 291.

at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface." In Colorado the width is limited to seventy-five feet on each side of the vein in four counties and 150 feet on each side in others. The federal statute prescribes that the end lines of each lode location shall be parallel to each other. This is held to be directory merely, but a failure to make them parallel forfeits the extra-lateral right.[58] The total width of a location cannot exceed 600 feet and the width is the perpendicular distance between the side lines.[59] This is the maximum size of the claim, whether located by a single locator or by many, but there is nothing to prevent one locator from taking up as many locations as he can perfect, in the absence of district regulations.[60] The purpose of marking the claim is to give full notice to all other prospectors of the extent of claim. This provision as to marking is mandatory.[61] The object of marking is also to fix the claim and make it certain and prevent swinging or floating it.[62] The claim should be marked so that any person of reasonable intelligence may go on the ground and readily trace the claim and find the boundaries.[63]

57. **Time for marking.**—The California courts have held that while a man is protected in his possession when marking the claim, strictly speaking, no

[58] Walrath v. Champion M. Co., 171 U. S. 293.
[59] Davis v. Shepherd, 72 Pac. 57 (Colo.).
[60] Last Chance M. Co. v. Bunker Hill, etc., Co., 131 Fed. 579-583.
[61] Ledoux v. Forester, 94 Fed. 600-602.
[62] Gleeson v. Martin, etc., Co., 13 Nev. 442-462.
[63] Willeford v. Bell, 49 Pac. 6-8 (Cal.).

time is allowed the locator to complete the marking.[64] The Circuit Court of Appeals in California declines to follow the California rulings and holds that a reasonable time is allowed within which to mark the claim.[65] Many states require marking within a specified time.

58. **Nature of marking required.**—The efficiency of the marking depends upon the circumstances. What would suffice in an open desert is not sufficient in a brushy or mountainous region. Ordinarily, four corner posts are satisfactory. Some federal cases have even gone so far as to hold that marking out the center line is sufficient. This, however, is an unsafe rule and the state courts do not follow it. 4″ x 4″ posts, set in mounds of stone where available, are ordinarily sufficient. Mounds of stone have also been held sufficient. Some state statutes require stakes, 4″ x 4″ and four feet above the ground, at the four corners and also at the end centers and the side centers. The state statutes should be consulted in every case for details. It is not necessary to set stakes at inaccessible corners, but witness posts are usually placed at convenient points to indicate where such corners were intended to be. Corners may be staked on unpatented claims, and even on patented lands where it is necessary to make the end lines of a claim parallel without sacrificing any surface ground,[66] but the locator cannot trespass

[64] Newbill v. Thurston, 65 Cal. 419; Patterson v. Tarbell, 37 Pac. 76 (Ore.).

[65] Doe v. Waterloo Min. Co., 70 Fed. 455. See Erhardt v. Boaro, 113 U. S. 527.

[66] Del Monte, etc., Co. v. Last Chance, etc., Co., 171 U. S. 55, LEADING ILLUSTRATIVE CASES; McElligott v. Krogh, 151 Cal. 126.

forcibly on another claim in order to set his stakes. There is no law requiring monuments to be perpetuated. If they once existed the right to the location cannot be divested by the obliteration or destruction of the markings, but prudence dictates the advisability of keeping up the monuments, for there is a danger of loss of evidence, entailing difficulty in proving the situs of the original markings.[67]

59. **Ground must be open to location.**—The location must include free ground—i. e., ground open to location at the time location is made. A subsequent abandonment by a senior locator will not inure to the benefit of a junior locator who originally placed his claim or a portion of it so as to include ground embraced within the then existing senior location, unless the junior locator subsequently amends his location and includes the forfeited or abandoned senior ground.[68] Without some act on the junior locator's part, the senior ground does not by mere gravity become part of the junior location. It was held otherwise in the case of Lavagnino v. Uhlig,[69] but this erroneous doctrine was overruled in the cases of Farrell v. Lockhart,[70] Brown v. Gurney,[71] and Swanson v. Sears.[72]

The location must include some portion, at least, of the apex of the vein. The Act of 1872 contemplates that the location should be made along the

[67] This is illustrated by the case of Daggett v. Yreka Mining & M. Company, 149 Cal. 357.

[68] Belk v. Meagher, 104 U. S. 279.

[69] 198 U. S. 443.

[70] 210 U. S. 142, LEADING ILLUSTRATIVE CASES.

[71] 201 U. S. 184.

[72] 224 U. S. 180, LEADING ILLUSTRATIVE CASES.

course or strike of the lode. In other words, a location on the dip only of the lode is invalid, unless the dip segment is not included in the extralateral rights of other claims.[73]

60. **End lines of lode claims.**—The function of the end lines is to limit the pursuit of the vein on the strike, and to define the limits of the extralateral right. Under the Act of 1872, substantial parallelism of the end lines is absolutely essential to the enjoyment of an extralateral right. The end lines need not be at right angles to the side lines. They may be at an acute angle. End lines must be straight and not broken.[74] In case the end lines are not properly laid out, the location, if unpatented, can be amended to rectify this, but the new rights date from the amendment. The end lines need not be of the same length, but each must have some substantial existence. It will not do for the claim to come to what is practically a point.[75]

61. **Side lines of lode claims.**—The primary function of the side lines is to connect the end lines and to complete the enclosure of the surface area of the claim. The position of the side lines is usually determined by the position of the apex of the vein. The side lines should not be more than 300 feet from the center of the lode, and, while the total width permissible is 600 feet, 400 feet cannot be taken on one side of the vein, because only 200 feet is taken on the other. The law contemplates that the vein shall, as

[73] Larkin v. Upton, 144 U. S. 19.
[74] Walrath v. Champion M. Co., 171 U. S. 293.
[75] Jack Pot Lode, 34 L. D. 470; Belligerent and other lodes, 35 L. D. 32.

far as possible, be traced on the surface of the ground, and, in the ideal claim, the vein intersects the end lines at their centers. Where the vein outcrops, there is ordinarily no difficulty in determining where the side lines should be. The Land Department has ruled that for executive purposes the shafts and other workings on the lode shall be taken to determine its position.[76] Side lines need not be straight or parallel. They may have crooks and elbows.[77]

62. **Side-end lines.**—Sometimes, however, it is found that the vein on its strike, instead of crossing the end lines, crosses the side lines, in which case the side lines become the end lines, or side-end lines, as they are called.[78]

63. **Excessive lode locations.**—One case of excess is where the notice calls for the usual statutory amount of surface, but the marking is erroneous and includes more than the law allows. If the excess be fraudulently staked, or the excess be so great as to mislead, the entire location may be held void.[79] But where the excess is innocently included and no one is misled, the location is void only as to the excess and this may be cast off.[80] United States Revised Statutes, § 2320, provides that "no claim shall extend more than 300 feet on each side of the middle of the vein at the surface." It often happens that long

[76] See par. 5 of Mining Regulations of Land Department.

[77] McElligott v. Krogh, 151 Cal. 126.

[78] Flagstaff Silver Min. Co. v. Tarbet, 98 U. S. 463; Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 478; King v. Amy & Silversmith, etc., Co., 152 U. S. 222.

[79] Ledoux v. Forester, 94 Fed. 600.

[80] Richmond Min. Co. v. Rose, 114 U. S. 576; Howeth v. Sullenger, 113 Cal. 547; Flynn Group M. Co. v. Murphy, 109 Pac. 851 (Idaho).

after the location has been made the apex of the vein is found to vary considerably from the exact center line or staked lode line of the location. Under such circumstances, if the location was originally staked in good faith, the courts will not compel the casting off of the excess over 300 feet from the actual vein apex.[81]

[81] Harper v. Hill, 159 Cal. 250, 113 Pac. 162. See also Costigan, American Mining Law, pp. 196-204.

CHAPTER V.

THE EXTRALATERAL RIGHT.

64. **Apex.**—The importance of determining what is the apex is apparent when we consider that "No lode claims shall extend more than 300 feet on each side of the middle of the vein at the surface."[82] The locator is entitled to "all veins, lodes and ledges throughout the entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."[83] The term "apex" was not in the Act of 1866, but came into use later. It is not always easy to determine the top or apex of a vein or lode. From the nature of things, the location of the apex in a particular case is a question of fact for determination by the jury, but it is the province of the court to instruct the jury what an apex is. Ordinarily, it is the part that outcrops on the surface, or, in the case of blind lodes (buried by wash), it is the portion that approaches nearest the surface.[84] A blind apex is one that does not outcrop, the top of the vein being covered by wash or slide material.

Judge William H. Beatty, in the Report of the Public Land Commissions, at page 399, said: "The top or apex is found by following the line of the dip up to the highest point of vein matter. It is the

[82] U. S. Rev. Stats., § 2320.
[83] U. S. Rev. Stats., § 2322.
[84] Duggan v. Davey, 26 N. W. 887 (Dak.).

highest part of the vein along its entire course. If the vein were divided into sections by vertical planes, at right angles to the course or strike, the apex is the highest point of each section. The apex is a surface —not a line or point."

The best and most comprehensive definition is that given by Ross Browne, an expert mining engineer and geologist, in a case in which he was a witness: "The apex of a vein is all that portion of the terminal edge of the vein from which the vein has extension downward in the direction of its dip."[85]

65. **Dip.**—The Act of 1866 granted the right to follow the dips, angles and variations of located veins. The Act of 1872[86] gave the locator of the apex "all veins, lodes and ledges throughout the entire depth * * * although such veins, lodes or ledges may so far depart from the perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." Dip and depth are of the same origin. The dip is the inclination of the vein toward the depth and is measured by the angle it makes with the horizontal. The underlay is the complementary angle of the dip.

66. **Strike.**—The strike or course of the vein is its longitudinal direction. The miners' strike follows the vein along the surface, no matter what angle the surface may have with reference to the horizontal.

The courts determine the position of the apex by the course of the vein on the surface of the ground. The dip is at right angles to the true strike, and is

[85] Lindley, Mines (2nd ed.), § 309.
[86] U. S. Rev. Stats., § 2322.

determined by a vertical plane at right angles to the general course or strike. The line of intersection of this plane with the vein is the dip. The dip is usually determined by taking the steepest incline at which the vein can be followed downward. Revised Statutes, § 2320, provides that a mining claim must be located "along the vein or lode." It is, therefore, important to ascertain in a general way the course of the apex on, or as projected vertically from, the surface, as nearly as possible.

67. **The extralateral right—General discussion.**—The extralateral right is the right to pursue or mine a vein in depth beyond and outside of the vertical side lines of a lode location where such location includes within its surface boundaries the apex of the vein. It is apparent, where the apex or top of a vein extends throughout the length of a location from end line to end line and the vein dips into the earth at an angle, that, sooner or later, in its descent into the earth, the vein will pass out laterally from beneath the surface and beyond the vertical side lines of the location, though at considerable depth below the surface, varying with the inclination of the vein. This right to follow the vein in depth is also called the apex right or dip right, and is confined to such extralateral portions of the vein as lie between vertical planes drawn downward through the end lines of the location and extended indefinitely in the direction of the dip of the vein. This right is one of the unique provisions of American mining law, and, while a similar right has been exercised in early Germanic mining, in Derbyshire, England,

and in a portion of Australia for a short period of time, it is only in the western or mining states of the United States that it has become a general law affecting extensive mineral deposits and has remained in force for a considerable period of time. It has given rise to much litigation.

This right is granted by Revised Statutes, § 2322, though the section does not in terms use the expression "extralateral right," which was coined later. The extralateral right is to be distinguished from the "intralimital" or "intraliminal" right, which includes that portion of the vein lying vertically beneath the surface of the location. The extralateral right cannot be exercised along the length or course of the vein beyond the end lines or vertical end line planes of a location. Placer locations possess no extralateral rights.

The extent and direction of the extralateral right depend largely upon the position of the apex of the vein with reference to the surface boundaries of the location, and also upon the direction of the end lines of the location.

68. **The extralateral right under the mining law of 1866.**—The Congressional Act of 1866 granted the right to a single vein, and surface ground was a mere incident. The miner staked out his length of vein on the surface and usually claimed a piece of surface ground for the convenient working of his lode. The extent of the surface varied with the local customs and regulations. In some instances the miner claimed the right to a piece of vein which was not included within any surface location, but the courts

soon held that the right to the vein was dependent upon its inclusion within the surface area located.[87]

The Act of 1866 did not require the end lines of the location to be parallel and as a result the locations made under this act have surface areas of various shapes. Many perplexing extralateral right questions have arisen by reason of this freedom of surface form and non-parallelism of end lines.

69. **Parallel end lines under the Act of 1866.**— When the end lines of a location acquired prior to the Act of 1872 are parallel, the courts have usually recognized the parallel end lines as defining the extralateral right.

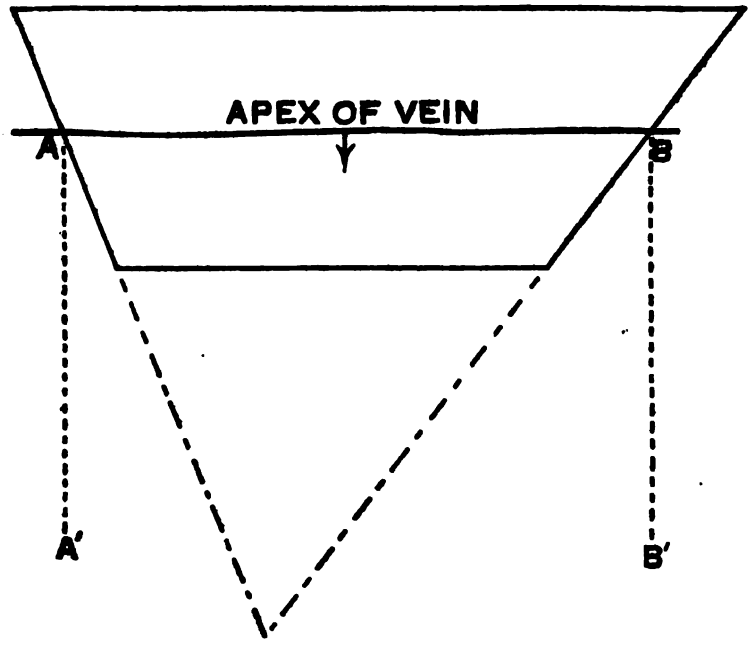
70. **Converging end lines under the Act of 1866.**— Locations with converging end lines made under the Act of 1866 have extralateral rights that are measured between vertical planes passed through the converging end lines and extended in the direction of the dip of the vein until these planes intersect.[88] This carves out a triangular segment of vein, as illustrated by the upper of the two diagrams on the following page.

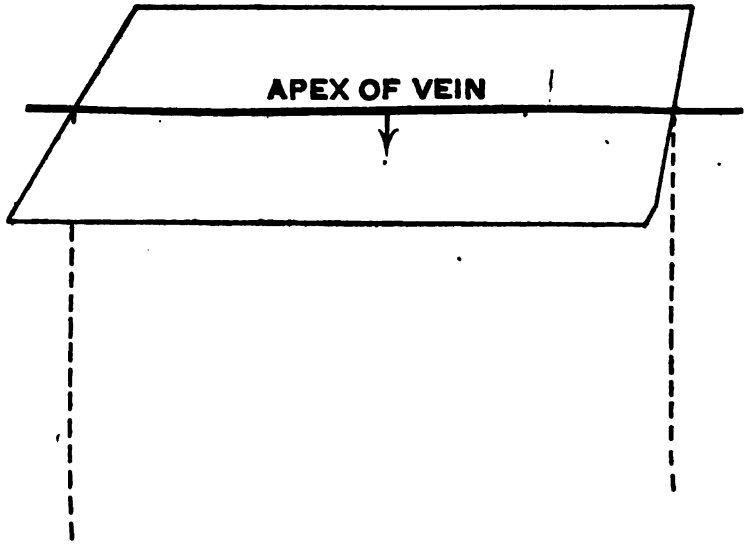
In view of the rule next discussed, applicable to claims with diverging end lines, it is difficult to see why a claim with converging end lines is not entitled to a segment of the vein in depth measured by planes at right angles to its general course and passed through its extremities. See dotted lines AA′ and BB′ in the diagram.[89]

[87] Flagstaff Silver M. Co. v. Tarbet, 98 U. S. 463.

[88] East Central Eureka Min. Co. v. Central Eureka Min. Co., 204 U. S. 266.

[89] See Morrison, Mining Rights (14th ed.), p. 198, and Costigan, American Mining Law, p. 416.


APEX OF VEIN
A
B
A'
B'


APEX OF VEIN

71. **Diverging end lines under the Act of 1866.**—It has been decided that the extralateral rights of claims with end lines diverging in the direction of the dip of the vein are measured by planes at right angles to the general course of the vein and passed through the extremities of the vein at the surface, as illustrated by the lower diagram on page 50.[90]

72. **The extralateral right under the Act of 1872.**—The Act of 1872 requires the end lines of the location to be parallel.[91] This was for the purpose of more definitely defining the extralateral right. Under the Act of 1866 great confusion and uncertainty had arisen by reason of the variety of surface forms of locations taken up under that act and the consequent difficulty attendant upon measuring the limits of the extralateral rights. However, many problems have arisen even under the Act of 1872, the determination of which depends upon the position of the apex of the vein with reference to the surface boundaries of each particular location.

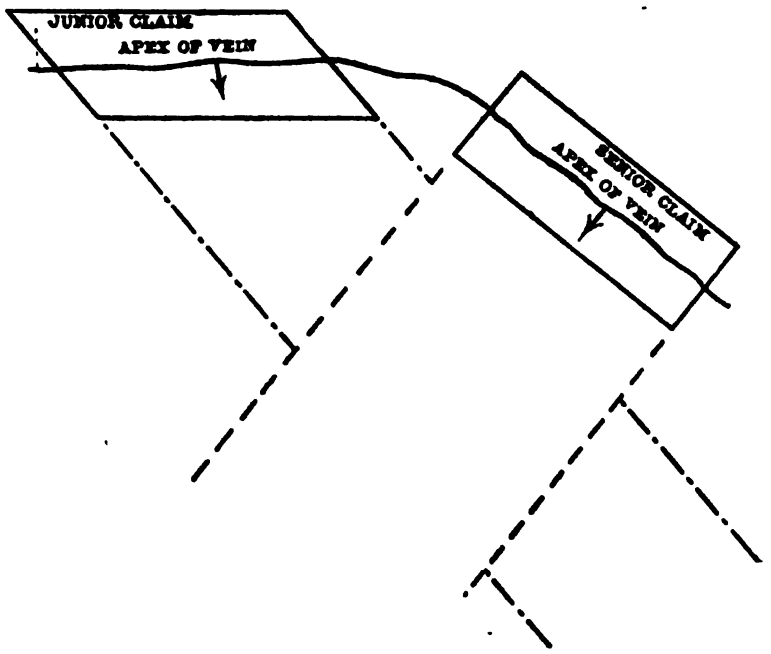
73. **Parallel end lines crossed by the vein.**—Ideal forms of surface location under the Act of 1872 are shown in the diagram on the following page.

When the apex of the vein extends from end line to end line as indicated, the extralateral right on the vein is measured between vertical planes passed through the end lines of such a claim and extended indefinitely in the direction of the dip of the vein.[92]

74. **End lines converging in the direction of the dip.**—There is some doubt as to whether an extra-

[90] Argonaut M. Co. v. Kennedy M. & M. Co., 131 Cal. 15, 63 Pac. 148.
[91] U. S. Rev. Stats., § 2320.
[92] U. S. Rev. Stats., § 2322.

lateral right can be exercised under such circumstances. The requirement of parallelism of end lines under the Act of 1872 has been held to be mandatory so far as the exercise of an extralateral right is concerned, though it has been argued that a location under these circumstances would acquire a much more limited right than if the end lines were parallel, and that, therefore, the right ought to be upheld.[93]

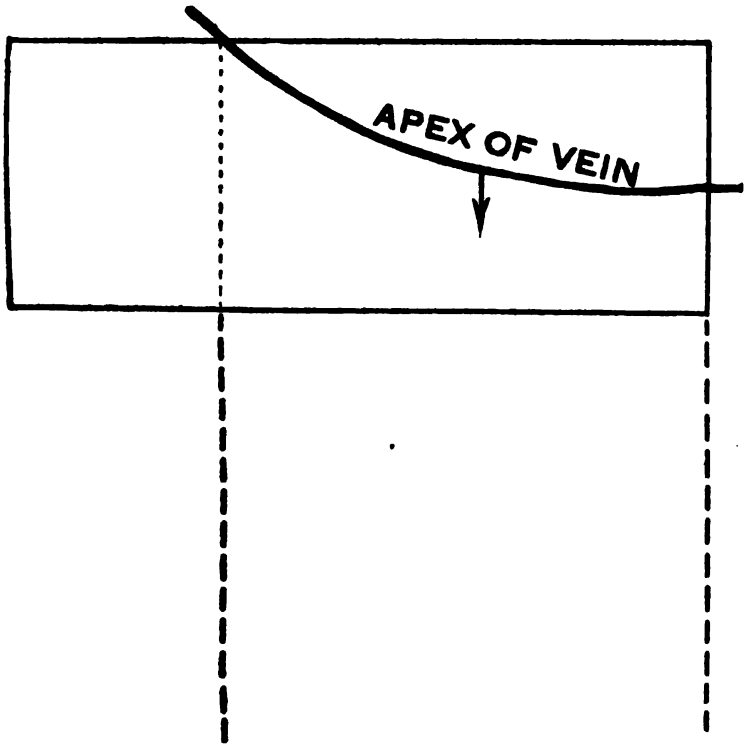


75. **End lines diverging in the direction of the dip.** —Under such circumstances it is quite clear that no extralateral right can be exercised. The statute is mandatory on this point, and the argument that planes passed through the end lines will include less of the vein than the statute contemplates cannot be

[93] See Central E. Min. Co. v. East Central E. Min. Co., 79 Pac. 834.

advanced when the end lines diverge in the direction of the dip of the vein.[94]

76. **Vein crossing an end line and a side line.**— The courts have held that the extralateral right is under such circumstances measured between planes,

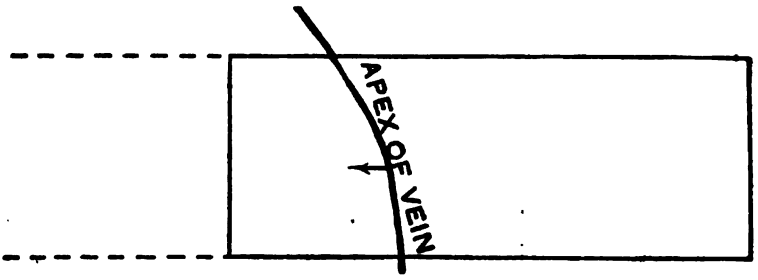


one of which is passed vertically through the end line crossed by the apex of the vein and the other plane passed parallel to the first plane through the point where the apex of the vein departs from the location through the side line.[95]

[94] Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968.

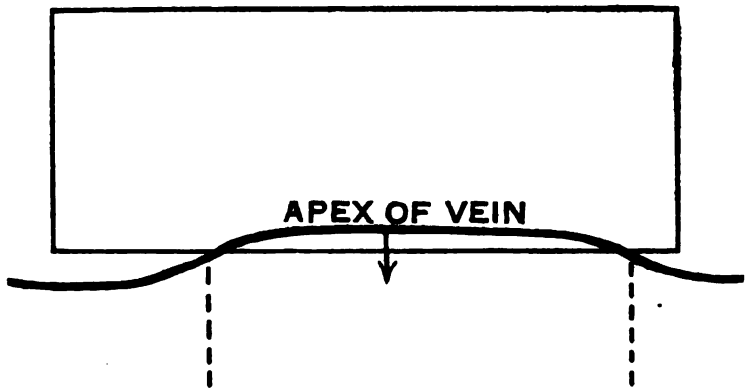
[95] Del Monte, etc., Co. v. Last Chance, etc., Co., 171 U. S. 55, LEADING ILLUSTRATIVE CASES.

77. **Vein crossing both side lines.**—When the apex of the vein crosses both side lines, the courts have held that, in the contemplation of the law, the side lines become end lines, or, more properly speaking, side-end lines, and that any extralateral right the claim has must be exercised between the side-end line planes. Of course, the side-end lines must be parallel, or at least they must not be broken or divergent in the direction of the dip, otherwise the right to follow the vein extralaterally will be denied.[96]

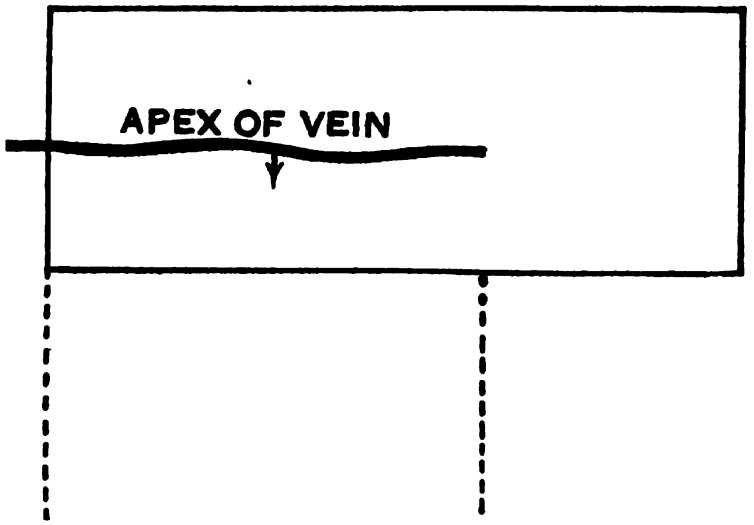


78. **Vein crossing the same side line, but neither end line.**—When the vein enters the claim and departs through the same side line, it is questionable whether an extralateral right exists.[97] It has been argued that if the segment of vein apex within the claim extends for some substantial distance along the length of the claim, an extralateral right ought to be granted between vertical planes parallel to the end lines and passed through the points of intersection of the vein with the side line, and in the case of a secondary vein such a right has been upheld.[98]

[96] King v. Amy & Silversmith, etc., Co., 152 U. S. 222.
[97] Catron v. Old, 23 Colo. 433, 48 Pac. 687, denied such right.
[98] St. Louis M. & M. Co. v. Montana M. Co., 104 Fed. 664.



79. **Vein crossing one end line and terminating within claim.**—When a vein crosses one end line and terminates within the boundaries of a claim, a vertical plane is passed through the point of termination parallel to the crossed end line.[90]



80. **Extralateral rights on secondary veins—Secondary veins defined.**—Secondary veins are such as

[90] Carson City, etc., Co. v. North Star M. Co., 73 Fed. 597, and 83 Fed. 658.

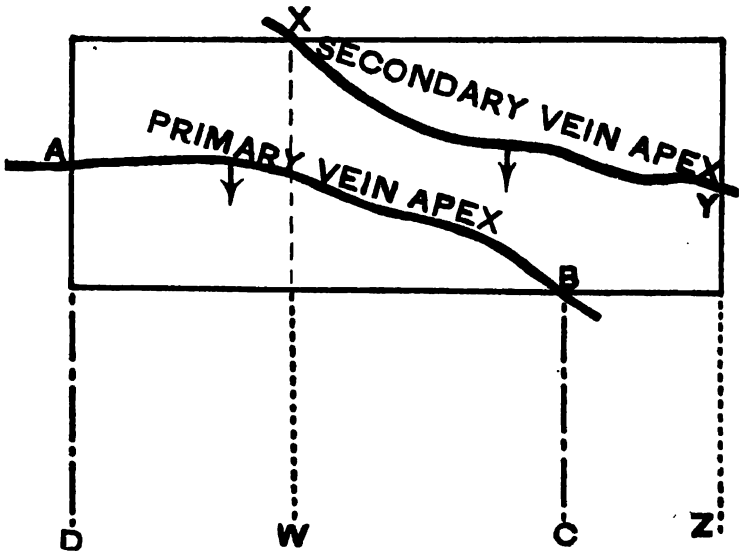
apex within the claim in addition to the primary or discovery vein. The Act of 1872 grants the right to all veins apexing within the claim, and even extends this right to locations made under the Act of 1866, which Act only granted the right to the one original discovery vein. When the secondary veins have the same extent through the claims as the discovery veins, the extralateral rights on the secondary veins are measured by the same planes as measure these rights on the discovery veins.

81. **Secondary and discovery veins differing in extent and direction.**—When secondary and discovery veins do not have the same extent and direction in the claims, the problem becomes complex. There are authorities which intimate that the extralateral right on the secondary vein is measured by the same planes that measure this right on the discovery vein,[1] but the best-considered opinion would seem to confine the extralateral right on the secondary vein to the actual segment of vein apex found within the claim and to measure it by planes parallel to the planes which measure the right on the primary vein.[2] To illustrate: In the diagram on page 57, AB represents the discovery vein apex and the extralateral right on this vein is measured between the planes AD and BC, while XY represents the secondary vein apex occurring within the claim, the extralateral right flowing from which would be measured by the planes XW and YZ.

Of course, if the secondary vein apex crossed both

[1] Jefferson M. Co. v. Anchoria-Leland M. & M. Co., 75 Pac. 1070 (Colo.).
[2] Ajax Gold Min. Co. v. Hilkey, 72 Pac. 447 (Colo.).

side lines of a claim where the discovery vein crossed one or both end lines, no extralateral right would be awarded the secondary vein, for extralateral rights on the discovery vein would be exercised between end line planes, and extralateral rights for the same

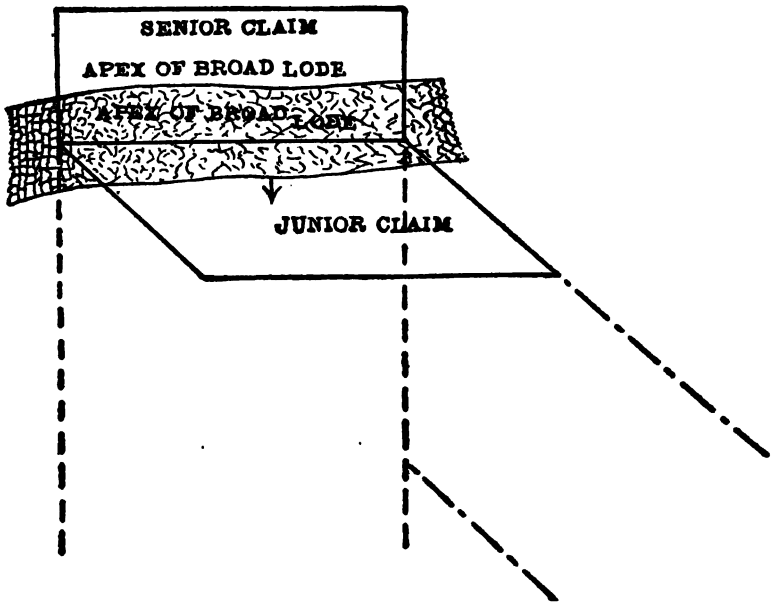


claim cannot be exercised between end line planes and also side-end line planes.

82. **Broad lodes.**—We frequently find veins or lodes of considerable breadth, in some cases the commercial mineralization extending several hundred feet in width. The consequent width of apex of such veins gives rise to many perplexing problems. Where the apex is bisected, a portion of its width lying inside of two claims, the senior claim is entitled to its respective extralateral right on the entire lode,[3] and if the junior extralateral sweep extends in a different direction the senior right must first be fully sat-

[3] Lawson v. U. S. Mining Co., 207 U. S. 1, LEADING ILLUSTRATIVE CASES.

isfied and the junior right takes only what is left within its particular sweep after subtracting the senior right.[4]



83. **"Jump-over" doctrine.**—In cases where extralateral sweeps extend in different directions and intersect, the senior right is superior and the junior right ceases where the senior right conflicts, but may be again taken up and exercised beyond the senior right.[5]

84. **Junction on the dip.**—Where veins which apex in different claims form a junction on the dip, the senior claim takes within its respective extralateral sweep the entire vein below the junction.[6]

[4] Empire Co. v. Bunker Hill, etc., Co., 114 Fed. 417.

[5] Empire Co. v. Bunker Hill, etc., Co., 121 Fed. 973. See Diagram illustrating section 73 of the text.

[6] U. S. Rev. Stats., § 2336; Little Josephine M. Co. v. Fullerton, 58 Fed. 521.

85. **Dip beneath prior patented lands.**—Where a vein apexes in a lode location and dips beneath the surface of a senior lode mining claim, the junior owner has the right to mine beneath the surface of the senior claim to the extent that such subsurface segment is not covered by the senior apex,[7] and the same rule would seem to apply where the vein dips beneath prior patented agricultural land.[8]

86. **Continuity, identity and burden of proof.**—In litigation, to establish an extralateral right, the burden of proving the existence of the right rests on the owner of the apex of the vein and he must justify his presence underneath the surface of adjoining ground owned by another. He must establish the identity of the vein segment he is mining on beneath the surface of another with the vein that apexes within his own ground and must prove the continuity existing between the different portions of the vein he is mining.[9] Courts will not indulge in conjecture as to the identity of widely separated vein segments or permit mathematical projections to take the place of demonstration of continuity by means of actual mine openings on the vein.[10]

[7] Clark v. Fitzgerald, 171 U. S. 92.

[8] Lindley, Mines, § 612; Costigan, American Mining Law, p. 450; but see Amador, etc., Co. v. South Spring, etc., Co., 36 Fed. 668.

[9] Penna. Con. Min. Co. v. Grass Valley Expl. Co., 117 Fed. 509.

[10] Keely v. Ophir Hill Cons. M. Co., 169 Fed. 601, 603; Collins v. Bailey, 125 Pac. 543, 548 (Colo.).

CHAPTER VI.

THE LOCATION OF PLACERS, TUNNEL RIGHTS AND MILL SITES.

87. **Character of placer deposit.**—There has been discussed in a general way what is meant by the term "mineral lands," and also what constitutes a vein or lode of quartz or other rock in place.[11] The right to acquire title to "claims usually called placers" was first granted by the Act of 1870, usually referred to as the Placer Act. Prior to that date the district regulations governed. Revised Statutes, § 2329, provides that "claims usually called placers, including all forms of deposits excepting veins of quartz or other rock in place, shall be subject to entry and patent under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims," etc.

The purpose of this section is to put placers on an equality with lodes.[12] The term "placer" was primarily applied to gold-bearing earth gravels which existed in a loose state,[13] but is now applied to asphalt, petroleum, borax, soda, nitrate, gypsum, marble, fine grades of clay and limestone, roofing slate, tailings, and ancient auriferous gravel channels. The mode of occurrence of the deposit deter-

[11] See Chapters III and IV.
[12] Clipper Min. Co. v. Eli Min. & Land Co., 194 U. S. 220, 227.
[13] U. S. v. Iron Silver M. Co., 128 U. S. 673, 679.

mines its character, whether placer or lode.[14] If the deposit occurs in lode or vein form and is in place, it should be located as a lode, otherwise as a placer.

The Land Department holds that common sand, gravel, brick clay, cement and limestone cannot ordinarily be located under the mining laws, since these deposits are too common to possess a distinctive mineral character and value.[15]

In 1892 Congress enacted that lands chiefly valuable for building stone should be classed as placers.[16]

In 1897 Congress enacted that lands chiefly valuable for petroleum should be classed as placers.[17]

88. **Requirements for a placer location.**—Generally speaking, these are the same as those for lodes, in so far as the latter may apply, and it will not be necessary to restate in detail all those principles which would naturally be equally applicable to both.[18]

(1) A discovery is essential.	Federal requirements.
(2) The location must be marked on the ground so that its boundaries can be readily traced.	
(3) Posting a notice on the claim.	Usual state requirements.
(4) Recording a copy of the notice.	
(5) Discovery work. (Seldom required.)	

[14] Webb v. Am. Asphaltum M. Co., 157 Fed. 203; Utah Onyx Dev. Co., 38 L. D. 504; S. F. Chemical Co. v. Duffield, 201 Fed. 830.

[15] 41 L. D. 314, 39 L. D. 310; but see 112 Pac. 172.

[16] 27 Stats. at Large 348.

[17] 29 Stats. at Large 526.

[18] See Chapter IV.

89. **Discovery.**—For some time it was doubted whether a discovery is required in the case of placers, for the statute does not so state specifically, as in the case of lodes.

A discovery has been held to be as essential to the validity of placers as in case of lodes, and the location is invalid without a discovery.[19]

A discovery is the finding of minerals in sufficient quantity to justify a prudent man to expend time and money in working the deposit. Whenever 10-acre placer locations are taken up by individuals, a discovery is required to be made on each location; but where several locators associate and take up 160 acres among them, only one discovery is required to perfect the entire location. However, the mineral character may be questioned and the locators might have to prove that all parts of their location were mineral in character.[20] Mere indications of mineral deposits are not sufficient.[21]

90. **Marking the placer location on the ground.**—The same rule applies as in case of lodes, except that where the public lands have been previously surveyed by the United States, the entry in its exterior limits must conform to the legal subdivisions of the public lands.

Revised Statutes, § 2330, provides that legal subdivisions of 40 acres may be subdivided into 10-acre tracts, but no location of a placer claim made after July 9, 1870, shall exceed 160 acres for any one per-

[19] Chrisman v. Miller, 197 U. S. 313, LEADING ILLUSTRATIVE CASES.
[20] Am. S. & R. Co., 39 L. D. 299.
[21] Chrisman v. Miller, 197 U. S. 313, LEADING ILLUSTRATIVE CASES.

son or association of persons, which location shall conform to the United States surveys.

Revised Statutes, §2331, provides that where placer claims are upon surveyed lands and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, and no location shall include more than 20 acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands. By virtue of these statutory provisions it has been held that when claims conform to legal subdivisions, no marking on the ground is required.[22] A recent Colorado case announces the contrary doctrine, however,[23] and a prudent locator will stake his boundaries.

Since the federal statutes do not require any posting or any recording of notices, a peculiar situation would arise if no marking on the ground other than the ordinary public survey corners were required, for there would be no evidence whatever that the land was claimed as a placer location.

The case of McKinley Creek M. Co. v. Alaska United M. Co.[24] goes to the extreme of liberality as to the nature of the marking required. In this case

[22] Reins v. Murray, 22 L. D. 409; Kern Oil Co. v. Crawford, 143 Cal. 298, 76 Pac. 1111 (overruling earlier California cases).

[23] Saxton v. Perry, 107 Pac. 281; see also Worthen v. Sidway, 79 S. W. 777 (Ark.).

[24] 183 U. S. 563.

a notice was posted on a stump in a creek bed, calling for a placer mining claim 1,500 feet in length running along the creek and 300 feet on each side from the center of the creek. The court held that the creek could be identified, that a definite relation between it and the stump existed, and that, combined with the measurements given in the notice, the boundaries of the claim could be readily traced. Some state statutes require additional marking, and the time for doing so is prescribed. Each state statute must be consulted.

91. **Association placers.**—An association placer mining claim is made by a number of individuals who associate themselves together for the purpose of taking up more than 20 acres of placer ground. The location cannot exceed 160 acres and there must be a locator for each 20 acres of area contained in the association claim, each locator holding an undivided interest in the whole.[25]

A corporation has been held to be an individual for the purpose of making a location.[26]

By a recent act of Congress an association location made thereafter in Alaska cannot exceed 40 acres in area.[27]

92. **Dummy locators.**—In the making of the association locations there is a great temptation to use the names of dummy locators. Where such names are used the courts have held that the location is void, at least as to any excess in acreage over the area which could be legitimately claimed by any

[25] U. S. Rev. Stats., § 2330.

[26] See Yard Case, 38 L. D. 59, and Igo Bridge Case, 38 L. D. 281.

[27] 37 Stats. at Large 242.

bona fide locators who may have joined in making the location. For example, if eight names are used to take up 160 acres and only three of these are actually interested in the enterprise, the location would be valid only as to 60 acres of its area.[28]

93. **Location notices of placer claims.**—These contain, ordinarily—

(1) Name of claim.
(2) Name of locator.
(3) Date of location.
(4) Number of acres claimed.
(5) A description with reference to natural objects or permanent monuments, unless the claim is described by legal subdivisions.

94. **Recorded notices of location.**—These are usually copies of the posted notices, and the record is generally required to be made within a stated time. The various state statutes must be consulted.

95. **Discovery work.**—Discovery work on placer claims is seldom required in any of the states.

96. **Conformity to legal subdivisions.**—United States Revised Statutes, §§ 2329 and 2330, provide that placer claims shall conform to legal subdivisions where practicable. This rule was ignored for years and placer claims were located and patents issued for all sorts of irregular-shaped locations. A few years ago the Land Department began to rule rigidly and compel strict conformity.[29]

Placer claimants on unsurveyed lands even were required to conform as nearly as practicable to legal

[28] Cook v. Klonos, 164 Fed. 529.

[29] Wood Placer M. Co., 32 L. D. 363; Rialto No. 2 Pac., 34 L. D. 44; Roman P. M. C., 34 L. D. 260.

subdivisions by locating in rectangular form with north, south, east and west lines.[30]

Where a placer claim is what is properly called a "gulch" placer and embraces the gravel bed and bars of a river and the canyon sides are steep and inaccessible and non-mineral, this rule of conformity does not apply.[31]

This rigid interpretation as to conformity has more recently been relaxed, however, and now, where any reasonable cause is given, a person may locate and patent a 20-acre placer claim, provided it is embraced in a 40-acre public survey subdivision, or a 40-acre placer, provided it is in an 80-acre subdivision, etc.[32]

The smallest legal subdivisions that are allowed for location purposes are 10-acre square tracts.[33]

97. **Excessive placer locations.**—The general rule applies that placers of excessive area, where located innocently, and which are not so excessive as to mislead, are void only as to such excess.

The courts have held that the locator has the option of determining where he will cast off such excess, but he must exercise his privilege within a reasonable time after discovering the excess, otherwise another may select and locate the excess.[34]

98. **Tunnel rights.**—United States Revised Statutes, § 2323, provides for the acquisition of tunnel rights. The Mining Regulations of the Land Depart-

[30] Laughing Water Placer, 34 L. D. 56.
[31] Wood Placer, 32 L. D. 401.
[32] Snowflake Placer, 37 L. D. 250.
[33] Roman P. M. C., 34 L. D. 260.
[34] McIntosh v. Price, 121 Fed. 716; Zimmerman v. Funchion, 161 Fed. 859; Waskey v. Hammer, 170 Fed. 31; Jones v. Wild Goose, etc., Co., 177 Fed. 95.

ment[35] state that the effect of this statute is to give tunnel proprietors a right to 1,500 feet of any blind lodes, cut by the tunnel and not previously known to exist, which are found within 3,000 feet of the point of commencement of the tunnel, and to prevent other persons from locating such lodes. Tunnel proprietors must give notice by erecting a substantial post or monument at the point of commencement, on which must be posted a notice. The notice should contain the date, names of locators, proposed course of tunnel, size, and should tie it to well-known objects, and the line of the tunnel to the extent of the 3,000 feet should be staked to notify other proprietors. A copy of the posted notice should be recorded. A sworn statement should be attached to the recorded notice, setting forth the facts and a declaration of intention to prosecute the work in good faith. After the discovery of the vein a location should be made on the surface and 1,500 feet along the vein may be taken on either side of the tunnel.[36] Tunnel proprietors acquire no rights to blind veins as against prior mining claims, patented or unpatented.[37]

A tunnel or tunnel site is not a mining claim and cannot be patented. It is a means of exploration. The federal statute does not prescribe what must be done to secure a tunnel right, but this is left to miners' customs and state statutes.[38]

[35] Pars 16-18.

[36] Enterprise M. Co. v. Rico-Aspen, etc., Co., 167 U. S. 108, 113.

[37] Calhoun Gold M. Co. v. Ajax G. M. Co., 182 U. S. 499.

[38] Creede & Cripple Creek M. & M. Co. v. Uinta Tunnel, Min. & Trans. Co., 196 U. S. 337, 357; 25 Sup. Ct. 266, LEADING ILLUSTRATIVE CASES.

99. **Mill sites.**—Mill sites are small tracts of non-mineral land used as sites for mills or for other mining and milling operations. Revised Statutes, § 2337, provides for two classes of mill sites:

(1) Where the mill site area is used by the proprietor of a lode for mining or milling purposes.

(2) Where the mill site claimant owns no lode, but has a quartz mill or reduction works on his mill site.

Mill sites must always be non-mineral and must not exceed five acres in area.

They should be located by posting and recording notices containing the usual data, i. e., date, name of locator, name of mill site, area, description by reference to natural objects or permanent monuments.

The boundaries of the mill site should be marked on the ground so that they can be readily traced.

First class. Any improvement in aid of mining and milling purposes is satisfactory on a mill site of the first class. The erection of necessary mine buildings or pumping works, and the dumping of waste, ore or tailings have been held satisfactory.[39]

Usually only one mill site can be located even in connection with a group of lode claims unless actual necessity for more than one is shown.

Second class. Nothing but a mill or reduction works actually existing on the mill site will satisfy the requirements for the second class.

While the statute requires that the mill site shall be non-contiguous to the vein or lode, it may be contiguous to the side lines of the lode claim.[40]

[39] Consult the Land Decisions, as each case is decided on the facts involved.

[40] Yankee Mill Site, 37 L. D. 674. See Mining Regulations of the General Land Office, pp. 61-65.

CHAPTER VII.

AMENDED LOCATIONS—RELOCATIONS AND ANNUAL LABOR.

100. **Amended locations.**—Occasionally a miner may wish to amend his location by changing its boundaries, paralleling end lines, including more ground, or to remedy defects in his original posted or recorded location notice. The right so to amend invariably exists, provided no intervening rights of others are materially affected, and the amendment usually refers back, under the doctrine of relation, to the date of the original location.[41] This is not true, however, where additional land is included, in which event the right to the additional land dates only from the date of the amendment including it. Where the amendment is for the purpose of curing a defect in the original location notice, there is some confusion among the authorities as to whether the amendment will be allowed to relate back to the original location so as to prevail against intervening adverse rights. Some courts hold that if the original notice was not totally void, the amendment will relate back, otherwise it will not.[42]

101. **Relocation.**—The terms "relocation" and "amended location" are frequently confused. Unlike an amended location, the relocation of a mining

[41] Bunker Hill, etc., Co. v. Empire, etc., Co., 134 Fed. 268.
[42] Hall v. Arnott, 80 Cal. 348, 22 Pac. 200.

claim presupposes an earlier location, the title to which has terminated. A relocation is usually made by a third party, though in many instances the original owner attempts to relocate his claim in order to avoid the necessity of performing annual labor. While the authorities are not uniform on the subject, the better opinion seems to be that relocations made under such circumstances are not looked on with favor.[43] In order that a relocation may be valid, the ground which it includes must be open to location as of the date of the relocation. A relocation, in so far as it includes ground which is at that date included in a prior existing and valid location, is void and any subsequent abandonment or forfeiture of the earlier location will not inure to the benefit of the later relocation. The ground subsequently thrown open to location must be thereafter included in the later claim by amendment.[44]

102. **Nature of and reason for annual labor.**—Annual labor, assessment work, or representation work, as it is variously called, is work and labor of a certain value which is required to be performed annually on unpatented mining locations. From time immemorial the performance of assessment or representation work on a mining claim has been a condition controlling the retention of title.

The provisions of the statute requiring the performance of annual labor are wise and salutary. Without them it would be possible for a few individ-

[43] Morrison, Mining Rights (14th ed.), p. 146.

[44] Belk v. Meagher, 104 U. S. 279; Farrell v. Lockhart, 210 U. S. 142, LEADING ILLUSTRATIVE CASES (overruling Lavagnino v. Uhlig, 198 U. S. 443); Swanson v. Sears, 224 U. S. 180, LEADING ILLUSTRATIVE CASES.

uals to locate the mineral lands of the public domain and hold them indefinitely. The necessity for performing annual labor, slight as the burden may seem, proves in actual experience to be a check on wholesale speculation and permanent segregation of mineral lands from the public domain without development.

103. **Federal statutes.**—United States Revised Statutes, §2324, provides that "on each claim located * * * and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year * * * and upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators * * * have not resumed work upon the claim after failure and before such location," and §2 of the Act of 1880[45] amended the foregoing section by providing, "That the period within which the work is required to be done annually on all unpatented mineral claims, shall commence on the first day of January succeeding the date of location of such claim. * * *"

104. **Time of performance.**—It is evident that a locator has until December 31st of the year following the year in which he makes his location, to perform his annual labor. He cannot perform the work during the year in which he initiates his location and have it count for the year following. While the stat-

[45] 21 Stats. at Large 61.

ute is explicit on the point that the work must be done "during each year," yet the courts are loath to declare a forfeiture, and if a claimant commences his work before the end of the year and prosecutes it vigorously on working days during working hours until it is completed, even though the greater part of it is done in the new year, his claim is not open to relocation.[46] Under such circumstances, where January 1st falls on Sunday, and claimant is in possession without working, but continues work Monday, an attempted relocation by a third party on Sunday is ineffectual.[47] The same is true of an attempted relocation made before the usual hours of starting work.

105. **Character of labor required.**—In order to satisfy the statutory provision, the labor performed or improvements made must be of such a character as to actually benefit and promote the development of the claim and facilitate the extraction of minerals therefrom.[48] Sinking shafts, driving tunnels, making exploration cuts and excavations in furtherance of prospecting or mining operations constitute an unquestionable compliance with the statute. Churn-drill and diamond-drill holes have also been held satisfactory as patent improvements,[49] and the same rule should apply to annual labor. Roads and trails constructed for the benefit of a claim which are necessary in order to afford access to the mine in question, and buildings erected upon a claim for any

[46] Willitt v. Baker, 133 Fed. 937.
[47] Fee v. Durham, 121 Fed. 468.
[48] St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 655.
[49] In re McCormick, 40 L. D. 498.

purpose reasonably connected with mining operations and development, have been credited as assessment work,[50] though, unless actual necessity is shown, improvements of this character are not generally looked on with favor. The services of a watchman, where necessary for the protection and preservation of mining machinery and buildings, have been held to be sufficient, but not where the intention on the part of the owners to resume active operations within a reasonable time is lacking.[51] These last-mentioned expenditures, viz., for roads, trails, buildings, and services of watchmen, are near the border line and do not possess the unequivocal character of actual mine openings and excavations. The courts are inclined to be liberal in their interpretation of the statutory requirements and any labor performed or improvements made in good faith that may with any show of reason tend to develop the claim, will be considered favorably.[52]

Sampling or surveying a mine, unwatering it for purposes of examination merely, traveling expenses in reaching it, placing of tools, machinery, or buildings thereon without any intention of using them permanently in actual mining operations, and dumping tailings on a claim have all been held insufficient and not within the spirit of the statute.[53]

The Land Department has held that a quartz mill situated on a claim and built for the benefit of that

[50] Doherty v. Morris, 17 Colo. 105, 28 Pac. 85.

[51] Hough v. Hunt, 138 Cal. 142, 70 Pac. 1059.

[52] Mann v. Budlong, 129 Cal. 577, 62 Pac. 120.

[53] Jackson v. Roby, 109 U. S. 440; Fredericks v. Klauser, 96 Pac. 679, 682 (Ore.).

claim alone is not an active agency in the actual development of the mine, since it has no connection with the operation of extracting minerals from the ground, but its function begins only when the process of mining has ceased.[54] While the question involved was the sufficiency of improvements for patent purposes, the analogy would seem to govern in the matter of annual labor as well. This seems to be a refinement of the rule. If subjected to the same rigid test, many improvements which are now admittedly sufficient would be ruled out. The courts are inclined to look to substance rather than shadow, and where good faith on the part of the mine owner is evident, they construe the law liberally and give him the benefit of any doubt.[55] They are not inclined to be as technical in their rulings on the question of labor and improvements as is the Land Department in patent proceedings.

106. **Group work.**—Oftentimes it would be a waste of labor to perform $100 worth of work on each one of a group of claims held in common. The natural and economic way to develop such a group of claims is usually by means of a main tunnel or shaft, or, in the case of placers, by a flume, ditch or reservoir, constructed for their common benefit. Under such circumstances it is permissible to perform all of the work, to the amount of $100 worth for each claim to be benefited thereby, on one or more claims of the group, or in special cases, outside of the group.[56] The work must be of such a char-

[54] Monster Lode Claim, 35 L. D. 493.
[55] Whalen Cons. Copper M. Co. v. Whalen, 127 Fed. 611.
[56] Jackson v. Roby, 109 U. S. 440.

acter as actually to benefit each claim for which it is performed. For example, work on a tunnel, the portal of which is higher in elevation than some of the claims in the group, would not ordinarily benefit such lower claims.[57] As a rule, the claims must be contiguous and there must be some community of interest in all of the claims.[58]

In the case of association placer claims only $100 worth of labor is required on each claim, which cannot, of course, exceed 160 acres in area, or in the case of Alaska cannot since 1912 exceed 40 acres.

107. **Annual labor, how valued.**—The statute is very clear on the point that $100 worth of labor or improvements is required each year, commencing with the year following the year in which the location is made. A question sometimes arises as to what constitutes $100 worth of work. There are some district regulations and state statutes specifying the value of a day's work, but it is questionable whether these are valid.[59] The value of a day's labor and of the material used naturally varies with the locality. The courts have held that the test is the reasonable value of the work or improvements and not what was paid for it or what the contract price was.[60] The actual value is the true test, though what was paid for the work is strongly persuasive as to value and tends to establish the good faith of the claimant.[61]

[57] Lawson, etc., Mine, 34 L. D. 655.
[58] Big Three M. & M. Co. v. Hamilton, 157 Cal. 130, 107 Pac. 301.
[59] Penn v. Oldhauber, 24 Mont. 287, 61 Pac. 649.
[60] Mattingly v. Lewisohn, 13 Mont. 508, 35 Pac. 111.
[61] McCormick v. Parriott, 33 Colo. 382, 80 Pac. 1044.

108. **Proof of annual labor.**—Many states have statutes requiring claimants to record affidavits to the effect that the annual labor has been performed and setting forth the nature and value of the work. No serious consequences can result from a failure to comply with these requirements, though it is always advisable to record proofs of labor.[62] Such recorded proofs are usually made prima facie evidence of the fact that the work was regularly performed whenever such fact is questioned in an action in court.[63]

109. **Resumption of labor.**—The mere failure to perform annual labor does not result in a forfeiture of the claim per se,[64] except in Alaska.[65] An intervening location initiated by another after the time for performing annual labor has expired, terminates the original location, but in the absence of such hostile location the original location remains dormant, as it were, and full right to the claim is continued by mere resumption of work. If work is resumed before an adverse location is made and continued with reasonable diligence until $100 worth of labor has been performed, the claim is once again "in good standing."[66]

110. **Forfeiture and abandonment distinguished.**—A forfeiture of a mining claim is a statutory termination of the location title[67] and occurs only where the locator has failed to perform the annual labor

[62] Book v. Justice M. Co., 58 Fed. 106, 118.
[63] Big Three M. Co. v. Hamilton, 157 Cal. 130, 107 Pac. 301.
[64] U. S. Rev. Stats., § 2324.
[65] Thatcher v. Brown, 190 Fed. 708.
[66] Belk v. Meagher, 104 U. S. 279.
[67] U. S. Rev. Stats., § 2334.

within the required time and another person has thereafter relocated the ground. Except in Alaska, mere failure to perform annual labor unaccompanied by a hostile location by another does not work a forfeiture.[68] Abandonment of a mining claim, on the other hand, depends solely upon the intention of the locator as evidenced by his conduct or declarations regarding his location. Abandonment operates immediately and no relocation by another is necessary to terminate the title.[69]

111. **Forfeiture to co-owners.**—This kind of forfeiture must not be confused with the complete forfeiture of the location just discussed. It is apparent that where there is more than one owner of a location, the burden of performing the annual labor may fall on one of them and the others may refuse to contribute their share. It is only just that there should be some expeditious and simple method of getting rid of such delinquent co-owners. This remedy is provided by United States Revised Statutes, § 2324. At the expiration of the year in which the work is performed, a notice may be served on each delinquent, and if he fails to contribute within 90 days his proportion of the expenditure, his interest in the claim becomes the property of the co-owner who has made the required expenditure.[70]

[68] Bingham Amal. Copper Co. v. Ute Copper Co., 181 Fed. 748, 750; for the rule in Alaska, see Thatcher v. Brown, 190 Fed. 708, 711.

[69] Brown v. Gurney, 201 U. S. 184, 192.

[70] See Turner v. Sawyer, 150 U. S. 578, and Elder v. Horseshoe M. & M. Co., 194 U. S. 248, for a discussion of the nature and effect of this remedy.

CHAPTER VIII.

MINING PATENT AND APPLICATION FOR PATENT.

112. **Nature of title acquired by location.**—An unpatented mining location is a distinct but qualified property right and may be sold, transferred, leased, mortgaged and inherited. Compliance with the provisions of the statute governing the making of locations has the effect of a grant by the United States to the locator of the present and exclusive right of possession.[71] A location is taxable and is assessed as real property.[72] The right of a locator to exclusive possession is good against all the world, including the government, but he is limited to uses of the property located which are incident to mining operations. The primary or paramount title, both legal and equitable, remains in the government until it grants this title to the applicant in the course of patent proceedings.[73]

113. **Nature of title acquired by patent.**—While a location title is theoretically property in the fullest sense of the word and this possessory right can be continued indefinitely by regularly performing annual labor and the minerals contained in the property can be completely exhausted meanwhile, yet a

[71] Gwillim v. Donnellan, 115 U. S. 45, 49; Manuel v. Wulff, 152 U. S. 505, 511.

[72] Bakersfield, etc., Co. v. Kern County, 144 Cal. 148.

[73] U. S. v. Rizzinelli, 182 Fed. 675, 680-684.

location title is unsatisfactory in many respects. It does not possess the stability and permanence which are usually demanded where large capital is to be invested, and the many acts upon which a valid location title is based and also the position of the boundaries are always open to question prior to patent. The patent is the formal instrument by which the government conveys the complete title to the patentee. The issuance of patent places beyond question the facts concerning location just mentioned. The boundaries of the claim become permanently fixed and all the acts of location and other facts necessary to the issuance of patent are conclusively presumed to be proved.[74]

114. **Procedure for obtaining patent.**—This procedure is somewhat complex and only the barest outline can be presented here.[75]

The supervision and disposition of public lands is committed to the Department of the Interior acting through the General Land Office and the local offices. Local land offices exist in the public land states where filings are made. A person desiring to obtain a patent to a lode claim or to a placer on unsurveyed public land or a placer that does not conform to the legal subdivisions of the public surveys, applies to the United States Surveyor General of the state in which the land is situated. A fee is paid, and the Surveyor General issues surveying instructions to a

[74] Galbraith v. Shasta Iron Co., 143 Cal. 94, 76 Pac. 901; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636.

[75] U. S. Rev. Stats., § 2325. The General Land Office, Washington, D. C., issues a circular containing the "Mining Laws and Regulations" governing these proceedings for obtaining patents to mining locations.

United States deputy mineral surveyor selected by the applicant. Official field notes and plats are prepared. A placer which conforms to legal subdivisions does not need to be surveyed. The applicant posts on the claim a notice of application for patent with one of the official plats. He files in the local United States land office of the district in which the claim is situated a formal application for patent, accompanied by many documents and proofs required by the regulations and having for their object the establishment of title in applicant and of the fact that $500 has been expended in improvements on the claim, etc. A notice of application for patent is published in the newspaper nearest the claim for 60 days and another is posted in the land office. After the 60-day period has expired (in Alaska the time for filing an adverse claim has been extended; see 39 L. D. 49), if no adverse claim on the ground has been filed by another, the applicant completes his proof of title by filing certain additional documents and pays $5 per acre for lode and mill site claims and $2.50 per acre for placer claims. If all the steps are regular, the local officers issue a certificate of purchase or certificate of entry, as it is called, and thereupon the equitable title passes from the government to the applicant and is followed by the issuance of patent, which passes the legal title as well and vests in the patentee a complete fee simple title.

115. **Adverse claim.**—If during the 60-day period an adverse claim is filed it must be followed within 30 days by a suit instituted in the appropriate court

which tries the possessory title to the land and pending its judgment the proceedings in the land office are suspended.

116. **Protest.**—A protest may also be filed by any one prior to issuance of patent and usually alleges a non-compliance with the laws or regulations. If sufficient reason appears to exist, a hearing is held in the local office to determine the truth of the allegations of the protest.

CHAPTER IX.

MINING CONTRACTS AND PARTNERSHIPS.

117. **Contracts peculiar to mining law.**—There are a few contracts peculiar to the law of mining, but for the greater part contractual relations between persons engaged in mining are governed by the general rules applicable to contracts. Only the exceptional features of mining contracts will be dealt with here.

118. **Grubstake contracts.**—What is popularly known in the West as a grubstake contract is an agreement whereby one party supplies the "grubstake" or provisions and the outfit and advances money to defray the expenses of the venture, while the other party goes out into the mining regions and prospects for, and attempts to discover and locate, mining claims.[76] Such locations inure to the benefit of both parties, each being entitled to a one-half interest where no other division is agreed on. These contracts are not required to be in writing, since they do not come within the Statute of Frauds.[77] When the grubstaked prospector locates mining claims in his own name, a trust arises which may be enforced against him.[78] A grubstake contract must be distinguished from a mining partnership, which it re-

[76] Berry v. Woodburn, 107 Cal. 504.
[77] Moritz v. Lavelle, 77 Cal. 10.
[78] Hendrichs v. Morgan, 167 Fed. 106.

sembles in some respects, but which relation usually does not arise until the objects of the grubstake contract have been accomplished, though thereafter the latter may merge into a mining partnership which will control the working and development of claims already located.

119. **Options—Working bonds.**—These are mostly executory contracts of sale and they usually provide for the development of the property pending a decision by the option holder as to whether he will exercise his right to purchase. Formerly the party granting the option also gave a bond binding himself to furnish a good title, but this is seldom required now, though in some cases a bond is required of the party to whom the option is granted, conditioned upon a faithful performance of the terms of the option. Where ore is mined and milled, a certain percentage of the gross or net proceeds is usually applied on the purchase price. Time is of the essence of such mining contracts, even if not specifically inserted in the contract, because of the nature of mining properties, which are subject to great and sudden fluctuations in value.[79]

These contracts must be in writing and are governed by the rules ordinarily applicable to contracts affecting real estate. Very frequently these contracts partake of the nature of leases or licenses, coupled with an option to purchase.

120. **Mining leases and licenses.**—The dividing line between mining leases and licenses to mine is not clearly defined. Especially is this true of leases

[79] Williams v. Long, 139 Cal. 186; Gaines v. Chew, 167 Fed. 660.

and irrevocable licenses. These instruments are commonly drawn up without any special regard for the exact nature of the rights granted, and very frequently they contain provisions which render it doubtful as to which class they properly belong. A mining license usually confers authority to go on the land and mine, without passing any estate in the mine itself. It is an incorporeal right and attaches to the minerals only when severed and only confers a personal property title.[80] A license is personal and therefore non-assignable and is revocable unless coupled with an interest. Ordinarily the test is whether or not the grantee has acquired any interest in the land.

A lease ordinarily conveys an exclusive and irrevocable right for a stated term and carries an interest in real property. There is little analogy between a mining lease and an ordinary surface lease of real property, for a mining lease is in practical effect a sale of a substantial part of the realty, i. e., of the ore mined during the term of the lease, with the rental payable in installments and frequently consisting of a percentage of the proceeds.[81]

121. **Oil and gas leases.**—Because of the fugitive and migratory character of oil and gas, the rules of interpretation governing leases of lands containing these substances are in many respects unique. To protect the lessor against the detriment which results from extraction of oil from the common reservoir by adjoining owners, the lessee must proceed

[80] Wheeler v. West, 71 Cal. 126.

[81] Graciosa Oil Co. v. County of Santa Barbara, 155 Cal. 140, 145, 99 Pac. 483.

with diligence and, contrary to the general rule, oil leases are construed more strongly against the lessee. While equity ordinarily abhors a forfeiture, in the case of oil leases forfeitures are looked on by the courts with favor and the lessor is protected against the indifference and laches and injurious conduct of the lessee.[82] This applies also to gas leases.

122. **Mining partnerships.**—A mining partnership differs in many respects from an ordinary partnership. A mining partnership arises where two or more owners of mining property jointly work the same. Mere co-tenancy without actual working is not sufficient to constitute a mining partnership, though an express agreement is not necessary to create it. Unlike an ordinary partnership, the death or bankruptcy of a partner or sale of his interest does not terminate a mining partnership.[83] The power of a mining partner to bind the partnership is not as great as in the case of ordinary partnerships.

[82] Doddridge County Oil & Gas Co. v. Smith, 154 Fed. 970, 978.
[83] Kahn v. Central Smelting Co., 102 U. S. 641.

CHAPTER X.

SPECIAL REMEDIES AND MISCELLANEOUS MATTERS.

123. **Injunction.**—In many cases where the defendant is actively mining ore, it becomes quite important that the plaintiff secure an injunction *pendente lite* (pending litigation) restraining waste, and in extreme cases courts will sometimes grant temporary restraining orders. Plaintiff must, however, on the application for an injunction, make out a case which would indicate that he is likely to prevail when the case is tried on the merits. Where the defendant is solvent and is working the mine in a satisfactory manner the court may, in lieu of an injunction, compel the defendant to account regularly to the court as to all ore extracted and may even require the proceeds to be paid into court pending the litigation.[84]

In most other respects the issuance of injunctions in mining cases is governed by the ordinary rules applicable to injunctions generally. Too great a delay in applying for an injunction usually defeats the right.

124. **Inspection and survey.**—Pending litigation, the courts are liberal in allowing opposing parties the opportunity to inspect, survey and sample each other's properties and mine workings and even to prosecute mining operations therein at their own

[84] See Colorado, etc., Co. v. Turck, 70 Fed. 294, 296.

expense in order to demonstrate their theories of the geological structure.[85]

Most states have statutes governing this matter, but the right exists independent of statutes.

125. **Measure of damages.**—The measure of damages in an action for trespass for ore wrongfully extracted from another's mine will depend upon whether the trespass was committed innocently, or whether it was willful or committed so negligently and with such reckless disregard of the rights of others as to be equivalent to a willful and intentional trespass. The defendant is allowed to deduct the cost of mining and milling from the gross proceeds of ore taken inadvertently and under honest mistake, but when the defendant took the ore under circumstances from which it can be inferred that he had knowledge of the situation, he is not entitled to reduce the recovery by deducting the cost of mining and milling, and he is liable for the enhanced value of the ore when finally converted by him. If he was negligent in acquiring knowledge, the trespass will be considered as if it were willfully and intentionally committed. For example, when the owner of one of two adjoining mines sinks a shaft on his own property and mines underground to the boundary between the two and intentionally or recklessly omits to exercise care in ascertaining the true position of the boundary and mines over into the other's ground, he is liable in the higher measure of damages.[86]

[85] Blue Bird M. Co. v. Murray, 23 Pac. 1022 (Mont.); Montana M. Co. v. St. Louis M. & M. Co., 152 U. S. 160.

[86] Resurrection Gold M. Co. v. Fortune Gold M. Co., 129 Fed. 668.

126. **Statute of Limitations.**—While there is authority to the contrary, the weight of judicial authority is in favor of the suspension of the running of the Statute of Limitations when one mine owner secretly mines ore belonging to another and thereafter conceals the fact, and the party whose ore is wrongfully taken has no knowledge or means of knowledge of such trespass. An underground trespass of this character is one of those cases where the fraud "conceals itself" and the Statute of Limitations does not begin to run until the trespass has been discovered.[87]

BIBLIOGRAPHY.

The following references to the literature dealing with the law of mines are for the benefit of those who wish to make a more exhaustive study of the subject. *Lindley* on Mines (3rd ed., 3 vols., 1914) is the most authoritative and comprehensive treatise on the subject, and this work has been the source of much inspiration and aid in the preparation of this article. *Costigan* on American Mining Law (1908) is an excellent textbook, but with a much more limited scope than Lindley. *Morrison,* Mining Rights (14th ed., 1910), is a small book, a new edition appearing every few years, and contains much valuable information. *Thornton* on The Law Relating to Oil and Gas (1912) deals with this special phase of mining law, but with particular reference to contractual rights arising in the Eastern States rather than to the acquisition of title to lands containing oil and gas on the public domain. The General Land Office, Washington, D. C., issues a circular containing the United States mining laws and regulations thereunder, which can usually be had free of charge on application.

[87] Lightner Mining Co. v. Lane, 161 Cal. 689, 120 Pac. 771, LEADING ILLUSTRATIVE CASES.

QUIZ QUESTIONS

LAW OF DESCENT AND DISTRIBUTION WILLS AND ADMINISTRATION GUARDIAN AND WARD

(The numbers refer to the numbered sections in the text.)

6-8. Define descent.

9. A bachelor dies without a will. He leaves no brothers and sisters, nor children of brothers and sisters. To whom will his real estate descend, at common law?

11. Would it make any difference in the above question, if his father and mother were still living? State the rule.

12-15. Suppose, in question 9, that the deceased left a brother and two sisters. (a) How would the real estate go? (b) Would his personal property go the same way?

16-17. What is meant by "blood of the first purchaser"?

18. What is the rule, at common law, relative to the rights of a half-brother on the mother's side? Suppose a man died leaving a widow with a male child. The widow married a second time and there was born another male child. Subsequently the first male child died owning real estate. To whom would this go at common law? State the rule.

20-23. What is meant by "who last died actually seized," and when is that important?

24-25. Suppose that one died a bachelor leaving real estate; that he was the only child of his parents who were the only children of their parents. His father and mother predeceased him. To whom would his property go at common law? Under statutes?

29. What is the rule relative to illegitimate children?

30. To what extent do the rules of distribution apply to real estate?

34. Define "will."
35. What is a nuncupative will?
36. What is a codicil?
38-43. Give a brief sketch of the origin and history of wills.
44-45. Who may make a will?
46. Suppose a man makes a will disposing of "all my property to my son." After making the will, he sells all his real estate, but later buys other real estate. At the time he made the will, he had $500 cash in the bank. At his death he leaves the real estate he bought after the making of the will and $5,000 in the bank. What does the son take under the will?
47-48. Can one sell his right to make a will? State reasons.
50. What is meant by "alternative wills"?
53. When will insanity operate to nullify a will?
54. What is the rule as to a married woman's right to make a will?
55-56. Can a child 9 years of age make a will? Give reasons.
61. Can a provision in a will be legally made for unborn illegitimate children?
63. Explain what is meant by the statement that a will is "ambulatory."
66-68. Suppose it is shown that a will of a testator was obtained by the fraud of one of the beneficiaries. The will contains also provisions for others who had nothing to do with procuring its execution. What are the chances of setting the will aside? State the rule.
69. When can it be said that a will is produced by fraud as distinguished from undue influence?
70. Give an example of undue influence sufficient to set aside a will.
71-76. After death of testator it was contended that he executed the will by mistake. Is this a valid objection to the validity of the will? State the rules.
78-80. Is it sufficient if the signature appears in the body of the will? State the rule.
81-82. What is meant by "incorporation by reference"?
83. A, in his last will, directs $1,000 to be given to such person as shall succeed in flying over the Atlantic Ocean. Is that bequest good?

84. The same testator also gives $500 to be divided among those of his friends whose names appeared in the "Star" newspaper published in Blankville, on June 1st, 1912. Is that bequest good?

86-87. Who may be an attesting witness?

88. What is meant by attestation?

89-90. One who had executed his will, which required attestation by two witnesses, called in one neighbor in the forenoon as witness and acknowledged the instrument as his will, whereupon the witness signed. In the afternoon the testator called in another neighbor and acknowledged the will to him, whereupon that neighbor signed. Is the will valid? State full reasons.

91. When is the testator's intention material?

92. When does a subsequent will revoke a prior one? State rule.

93-95. A testator had a will prepared by his attorney, who made a draft in duplicate. The one copy was properly executed and attested and this the testator took along intending to put it with his other valuable papers. On his way home he stopped at a tavern where he imbibed freely to the extent of intoxication, and while thus under the influence of liquor, took all his papers out of his pockets, the will included, and destroyed them. On his way home he met with an accident and was instantly killed. Did he die testate or intestate?

96. What is meant by "dependent relative revocation"? State the rule.

97-98. A testator makes a will and then marries. He dies subsequently without making a new will. Does he die testate or intestate? State the rule. Suppose children have been born. Would that change the rule?

99. Does divorce revoke a will?

101. When is a will republished, and what is the effect of republication?

102. What is the exception to the rule that a codicil to a will makes the will speak from the date of the codicil?

104. What is the distinction between a lapsed and a void legacy or devise?

105. Suppose a will gives $500 to A and A dies before the testator. What becomes of the $500 legacy?

106. What is the rule where a legacy is given to "all who are now my servants" and some of these servants die before the testator?

110-111. Suppose one wills a piece of real estate to A and before his death sells the real estate and deposits the money in a bank where it remains until his death. What does A get?

112. What is meant by ademption of specific legacies?

113-114. What is the effect of a gift by the testator to a beneficiary under the will, during the testator's lifetime? What is that called?

115. State the meaning and give the history of "probate."

117-118. What is "administration"?

119. What would you say of the jurisdiction of courts in the administration of decedents' estates?

120. Who has the first right to administer upon an estate? Who has the next right?

121-122. Suppose that the person entitled to administration is determined and he is ready to accept the office; what is the next step to be observed?

123. What is the force of acts of one purporting to be an administrator or executor, in the matter of the estate, before authority is actually conferred?

124. The various beneficiaries under a will petition the court to remove the executor because they do not find him as congenial as they might wish. What should the court do?

125-126. What are the duties of an executor or an administrator?

127. As a result of a breach of promise to marry, the young lady in question died. Can her administrator sue the other party for the breach?

128. What should the inventory contain?

129. What is the rule relative to the administrator's right where a building upon property of the deceased, covered by insurance taken out by deceased, is consumed by fire?

130. If you were administrator of an estate and as such administrator received a large sum of money in cash, belonging to the estate, what would you do with it?

131. Suppose the deceased was the owner of and conducted a factory; that through the negligence of one of the managers thereof someone was injured therein, during the life of the deceased; and that no action was brought until after the decease of the owner. Against whom should it be brought under the rules of the common law?
132. What was the order in which debts were payable out of the estate of the deceased, at common law?
133. To what extent is one of two joint executors or administrators bound by the acts of the other?
134. The deceased died in California and administration was taken out there. The deceased left money in deposit in New York City. What steps should be taken to enable the California administrator to get this money?
135. Define "administrator with the will annexed."
136. Define "administrator de bonis non."
137. What compensation is an administrator entitled to?
138-139. Define guardianship.
140-141. What are the various kinds of guardianship in the United States?
142. (a) Who are natural guardians? (b) What jurisdiction has a natural guardian over the property of his ward?
143-144. (a) What is meant by "testamentary guardianship"? (b) Who can be made testamentary guardian?
145-147. Where the court appoints the guardian, who should be appointed?
148-149. What is the guardian's power and control over the person of the ward?
150. Suppose you became guardian of a ward whose estate consisted of $25,000 in gold which lay in a safety deposit vault. What is the first thing you would do?
151. In what manner may a guardian dispose of his ward's real estate?
153. State six ways in which the period of guardianship may be terminated.
154. Is a guardian entitled to compensation?
155. (a) If the guardian exceeds his authority in his administration of the ward's property, what remedies has the ward? (b) Is a gift from ward to guardian, good? (c) What is a guardian ad litem?

QUIZ QUESTIONS
LAW OF
LANDLORD AND TENANT

(*The numbers refer to the numbered sections in the text.*)

Introduction: Explain the modern meaning of "landlord and tenant."

1. What kinds of property may be the subject matter of a lease?
2. (a) Define the different kinds of tenancies.
   (b) A house is rented from month to month, nothing being said as to the length of time the tenant shall have possession. What kind of tenancy is created?
   (c) Distinguish a tenancy from a letting of lodgings.
3. Distinguish between sub-letting and assignment.
4. Give an example of the creation of the relation of landlord and tenant by implication.
5. Discuss the capacity of an infant to be a party to a lease.
7. Explain what is meant by the landlord's reversion in case of a lease.
9. Give a definition of a lease.
11. What is the difference between a lease and a license?
14. (a) In a state which prohibits the sale of intoxicating liquors, a building was leased for a term of three years, the landlord knowing that a part of the premises was to be used for the sale of liquors. Discuss the validity of the lease.
    (b) When must a lease be in writing?
    (c) A writes B a letter in which he says that if B will move onto the writer's farm, he may have it for five years, and maybe longer. Is this a good lease?
    (d) A contract agrees to lease eighty acres of land in D County, State of Wisconsin, situated in Sections 3 and 4 of a certain township and of a certain range. Is this a sufficient description?

(e) Is it necessary that the tenant should sign a written lease?

16. Explain what is meant by a condition in a lease.

17. Distinguish between conditions precedent and subsequent.

20. (a) A lease contained a provision that the building leased should be occupied as a grocery store. Was this a condition or a covenant?

(b) In case of doubt whether, in a lease, the parties intended to create a condition or a covenant, what construction will be given to the doubtful clause?

21. Give an example of a condition in a lease that runs with the land.

22. What is the effect of a breach of a condition in a lease?

23. Distinguish an exception from a reservation.

24. (a) Define covenant.

(b) Upon what parties are covenants binding?

26. What is the remedy for breach of covenant?

27-28. (a) Explain the covenant for quiet enjoyment.

(b) In case of a lease, what are a landlord's usual implied covenants?

(c) In case of a lease, what are the tenant's usual implied covenants?

(d) Whose duty is it to make repairs upon leased premises?

(e) A tenant leases a building for a dwelling house. On taking possession, he finds that the roof leaks so badly that the building is practically untenantable. Is he bound by his lease?

(f) A person hires a furnished house for a year. After a few days' possession, he finds it so infested with vermin that he moves out. Is he obliged to pay the rent for the year?

29. What is meant by a "fixture"?

33. (a) A tenant, during his term, and at his own expense, laid a tile-floor in a leased building. May he, before the expiration of his lease, remove the tile-floor and restore the premises to their previous condition?

(b) A tenant hired a building for a liquor saloon. He placed in it a bar and an ice chest, fastening these articles to the wall and to the floor. May he remove them during his term?

(c) A tenant hired a dwelling house. In the house he placed several large mirrors, resting them on supporting shelves, and fastening them at the top by iron spikes driven into the wall. The frames were painted in the same style as the woodwork of the rooms in which they were placed. Were the mirrors fixtures or personal property?

38. (a) A tenant, upon the first day that he takes possession of a leased house, is severely injured, owing to a defective stairway leading into the cellar. Is the landlord liable?
(b) A tenant is entertaining guests in a leased house. One of the guests, leaning against a balcony railing in the second story, receives a bad fall, due to the fact that the railing was badly out of repair. Discuss the liability of both the landlord and the tenant.
(c) With reference to third persons, whose duty is it to clean ice and snow from the sidewalk in front of leased premises?

39. What rights has a landlord to enter leased premises?

43. What is meant by the statement that a tenant cannot deny his landlord's title?

44. (a) Explain what is meant by a tenant's committing waste?
(b) What is meant by a tenant's right to emblements?
(c) A single man leases a farm for two years. He has no known relatives. He puts in a crop in the fall of the first year, but dies before the crop is harvested. Who owns the crop?

47. A passer-by upon the street falls into an open coalhole, left uncovered by the ten-year-old son of the tenant. Is either the landlord or the tenant liable?

51. In case of the death of a tenant, whose duty is it to pay the rent?

52. In case of the death of the landlord, to whom is the rent payable?

53. (a) A person leases a dwelling house from the owner and moves in the next day. The following day the landlord calls and asks for a month's rent in advance. The tenant says that nothing was said as to advance payment when the verbal lease was made. The landlord replies that it is the custom locally to pay rent in advance. Must the tenant pay?

(b) Where rent has been paid in advance for six months, and the premises are totally destroyed by fire before the expiration of the term, may the tenant legally recover a part of the advance rent paid?

55. A tenant for a year holds over his term for two or three days, while moving out his goods. For how much rent is he liable, if for any?

57. Has a landlord a lien upon the household goods or crops of his tenant?

58. What is meant by distress for rent?

60. A lease reads that it is made for "one year from the 14th day of April, 1913." On what day and hour does the term end?

61. In what kind of tenancy is a notice to quit necessary?

63. What effect has the sale of leased premises upon the lease?

68. What is meant by the surrender of a lease?

69. A tenant's farm is taken by a city for the purpose of a public park. What are the tenant's rights?

71. Upon the termination of a lease, may a landlord take possession by force, providing the tenant refuses to vacate?

72. Explain what is meant by summary proceedings for the purpose of regaining possession of leased property when a tenant holds over his term.

QUIZ QUESTIONS

LAW OF IRRIGATION AND WATER RIGHTS

(*The numbers refer to the numbered sections in the text.*)

1. Under what circumstances and to what extent does the common law regard water and its uses as property?
2. Give a general classification of the uses of water and of property rights in streams and bodies of water.
3. What are the legal systems established for the regulation and protection of private rights in water?
4. State the fundamental difference between the uses permitted in the two systems regulating water rights, with reference to climate and geographical conditions.
5. (a) Define the term, "Riparian Water Rights." (b) Give the incidents and limitations attached thereto.
6. What requirement exists as to the return of water to the source of supply after use?
7. What, in general, is the character of the use permitted to the riparian proprietor? May the riparian right be severed from the riparian lands to which it is incident and thereafter be dealt with as a distinct property right?
8. At what time and in what part of this country was the common law riparian doctrine first modified and repudiated and by what rule or system was it superseded?
9. Define briefly the doctrine of appropriation. (a) For what character of uses may appropriations be made? (b) What is the characteristic difference between riparian rights and rights acquired by appropriations?
10. Define the term, "irrigation."
11. How did the practice and law of irrigation originate in this country? What influence did (a) the aridity of the

climate, (b) the topography of the country, (c) the industrial pursuits of the early settlers, (d) formal legislation, have in establishing the doctrine of general consumptive uses? Which of these were controlling?

12. May water for irrigation be diverted from the stream and carried beyond the limit of the watershed constituting the source of supply? If so, upon what theory or principle is the practice allowed?
13. Did the early decisions of courts upholding the rule of appropriation, rest upon any statutory declaration, or entirely upon the law of natural necessity? What is the force and effect of the Acts of Congress of 1866 and 1870 as to the right of appropriation of water for beneficial uses?
14. Has the Supreme Court of the United States recognized the rule of appropriation as existing and controlling upon the general public domain? Discuss the case of Atchison vs. Peterson in this connection.
15. Upon the adoption of the constitutions and the passage of laws in the states comprising the arid West, did the fundamental rights of property in public waters remain unchanged? Could they be denied or even changed by constitutions, legislatures or courts? State reasons for your answer.
16. Is there any conflict in the theory of origin of the right to appropriate? Is the doctrine of appropriation now established in the arid West consistent with the common law riparian doctrine so that the two can coexist?
17. What waters are subject to appropriation? Of what do the public waters consist? Enumerate the sources of supply from which the appropriator may secure water.
18. (a) Of what does a natural stream or water course consist? (b) Is it necessary that the body of water flowing therein should be constant in volume or continuous in flow? (c) Discuss the essential conditions of permanency and illustrate.
19. What is a tributary? What relation does the tributary bear to the main stream under the doctrine of appropriation?

20. Define the term, "spring." Are spring waters a source of independent appropriation?
21. Define what is meant by the term, "lake or pond," and state whether the waters thereof are subject to general appropriation.
22. What is meant by the term, "flood or storm waters"? Distinguish from waters of a natural water course and state whether they may be appropriated to beneficial uses.
23. (a) State what is meant by the term, "underflow." Does it form a constituent part of the surface stream, and if subject to appropriation, how may such waters be appropriated with reference to the surface waters of the stream? (b) Suppose A is an appropriator from a stream. B, without rights of appropriation on the stream, sinks a well on the banks thereof, and by pumping diverts the underflow of the stream to his own uses. A's supply of water being reduced thereby, he desires to know his rights. What remedy or remedies does he have?
24. (a) What classes of underground streams are there? (b) What rules of law govern the appropriation and diversion of such waters? (c) What does the term, "developed waters," describe? (d) In the carriage of such waters to place of use, may the surface streams and water courses be used as conduits with full right to the appropriator to take out again for his own uses the said waters? (e) What burden rests upon the appropriator who thus utilizes the natural water course as a carriage channel?
25. Define the term, "percolation," and distinguish it from "underflow." Are such waters subject to general appropriation?
26. (a) What is the character of waters referred to as "seepage or return waters"? (b) State whether such waters may be the subject of appropriation, (1) while flowing upon or through the lands upon which they have arisen, (2) after escape from the land and upon the establishment of a connection with the natural stream. (c) Suppose A's lands have been injured by seepage waters, A thereupon builds a system of drainage and applies the waters so collected to beneficial use upon other lands belonging to him; thereafter he sells the water to

B. Does B acquire a valid title to such seepage waters against C, an appropriator of water farther down the stream?

27. (a) What are waste or diffused surface waters? (b) May an appropriation be made thereof and a vested property right be acquired therein as against (1) strangers to the source of supply, (2) the landowner upon whose lands the waste or surface waters arise? (c) What are the rights and duties of the landowner upon whose lands waste waters arise?

28. (a) For what purposes may appropriations of water be made? (b) May appropriations be made without a present intent to apply water to a definite beneficial use, the use to be afterward selected as occasion or opportunity may offer? (c) May an appropriation of water be made for speculative purposes? (d) Which use or uses, if any, are given a preference under the law?

29. What construction is given to the provisions of constitutions granting preference to certain classes of uses?

30. (a) Does relative pecuniary value of the different uses determine, to any extent, the relative rights of the respective appropriators? (b) Suppose A, an appropriator, applies water appropriated to the raising of hay which produces a net revenue of $10.00 per acre. B, a subsequent appropriator, is raising garden truck which gives him a net income of $500.00 an acre. Water being scarce, B, relying on the fact that greater economic value is produced by his crops and employment given to a larger number of workers, demands the water being used by A. What result and why?

31. In what way is an appropriation of water for beneficial uses initiated and perfected?

32. Enumerate four distinct steps involved in the process of perfecting an appropriation.

33. What is meant by the term, "intent," in reference to the appropriation of water? As a practical matter, how is the nature and extent of the intent of the claimant manifested? Enumerate circumstances properly entitled to consideration.

34. What is the necessity for "some open physical demonstration"? In what does it consist?
35. (a) What are the general provisions of legislation enacted requiring posting of notices at the time of the initiation of an appropriation? (b) Is a compliance with these statutory provisions a condition precedent to the making of an appropriation, or are they directory provisions for the better preservation of the evidence of the preliminary acts required? (c) Does such compliance constitute prima facie evidence of the doing of the initial acts required?
36. In general, does the acquisition of a water right by appropriation rest upon compliance with statutory provisions or upon the substantial basis of things done?
37. What effect may legislation have upon, (a) substantial rights acquired or to be acquired in the use of water for beneficial purposes, (b) the regulation and control of the processes of distribution?
38. Is public interference in the regulation and control of the processes of distribution justified? What is the final step of appropriation, by which the appropriator comes into the full enjoyment of his property?
39. What is the ultimate test of the amount or extent of the appropriation for the irrigation of lands, and what relation, if any, has the acreage of the land irrigated to the volume of water which may be diverted?
40. May a diversion in greater quantity or for a longer time than the demands of the appropriator can reasonably require, be considered as an application to a beneficial use? What relation does the capacity of the appliances by which the water is diverted or carried, bear to the amount of the appropriation?
41. May the appropriation be in excess of the carrying capacity of the diverting ditch? May the carrying capacity of the diverting ditch be in excess of the appropriation?
42. To what extent is the appropriation limited or measured by the actual needs and necessities of the claimant at the time of the making of the appropriation? May the appropriation be held to cover the requirements for such extended cultivation of the lands of the claimant as he had in view at the time of the making of the appropriation,

provided, of course, that the element of reasonable time be satisfied?

43. In what manner must the steps necessary to the completion of the appropriation be actually performed?
44. Is there a statutory rule defining diligence for all cases or must the rule of diligence be determined in each case in the light of the circumstances surrounding the particular enterprise?
45. What elements may be properly considered in ascertaining whether the appropriation has been completed with diligence?
46. If diligence has been exercised in completing the appropriation by actual application of the water to beneficial use, what rule of law may the appropriator claim the benefit of? Define "the rule of relation back" and account for the necessity of its adoption.
47. What is the fundamental maxim or rule by which the relative rights of appropriators of water for beneficial uses are determined? How did the rule originate? What test has been established to fix the "time" which is the "first"?
48. State the two theories of original ownership of the public waters subject to appropriation.
49. In the arid parts of the United States, did land, together with all the innavigable streams flowing thereon, originally constitute an unsevered public domain of which the federal government was the sole proprietor? Was it then in the power of the federal government to sever the title to land and water and make separate conveyance of each, by dedication, general grant, or individual grant?
50. (a) What affirmative statutory provisions, if any, were made respecting the asserted rights of settlers to divert waters for beneficial uses and thereby acquire property therein? (b) In what way was this practice of settlers acquiesced in by the federal government? (c) Did the United States part with title to the public waters to the states upon their admission severally into the Union and the acknowledgment of their proprietorship and jurisdiction by the government?
51. Distinguish between the ideas of proprietorship and jurisdiction as applied to the respective rights of the federal

and state governments in public waters. What error, if any, has arisen from a confusion of these ideas?

52. What provisions were made in the Desert Land Act, March 3, 1877, with reference to the waters of the innavigable streams upon the public domain of the United States?

53. (a) What is the ultimate source of title in the appropriator of water from the public domain? (b) Of what importance in the derivation of title is the severance of the title to land and water, and the dedication by the United States government of the water to appropriation and beneficial use by private settlers on the public lands?

54. (a) May the riparian right be severed from the land to which it is appurtenant and solely conveyed as a separate property right? (b) Is there any logical connection between this right of severance and conveyance, and the origin of titles by appropriation?

55. (a) Is or is not the water right by appropriation in its nature appurtenant to particular lands? (b) Is there any limitation upon the right to segregate land and water or is a complete severance thereof permitted? (c) How is this done and why?

56. What is property? Are the rights acquired by appropriation, property? Name the three chief elements which constitute the property right in appropriation.

57. Do both the first and last appropriators upon the stream have property rights in their appropriations? (1) Suppose A, in the year 1875, perfected an appropriation for 10 cubic feet of water and B, in 1876, perfected an appropriation for 15 cubic feet of water upon the same stream, the flow in the stream rarely exceeding 18 cubic feet. Which appropriation possesses the greater value upon the facts stated? (2) Suppose A in 1880 enlarges his original appropriation to 20 feet. Is A's enlarged user of 10 feet prior or subsequent to B's appropriation?

58. (a) Is the body of the water while flowing in the stream private property? If not, why not? (b) In what does the property right of an appropriation chiefly consist? (c) When, if ever, does a property right in the very water itself arise? (d) If the water itself may be re-

duced to private ownership, is it real or personal property?

59. Is the right of appropriation in water a corporeal or incorporeal hereditament? Is the water right real property? If so, is it dealt with and conveyed as other real estate?

60. Generally, in what ways may water rights be sold and conveyed? Suppose A owns Blackacre, which is irrigated in the four following ways: (a) by water supplied to A by the X company, a mutual ditch company, by reason of A's ownership of stock in said company; (b) by water supplied from the Y company's ditch, A's right to this water resting upon a contract with the company; (c) by proportionate ownership together with other private persons in a ditch which delivers water within the boundary of A's land; (d) by water developed from waste and seepage waters upon Blackacre. A sells Blackacre to B, together with his entire water supply. How should transfer or conveyance of the water rights above described be made?

61. May a water right be, (a) devoted to a beneficial use different from that for which the appropriation was originally made, (b) diverted from the stream at a point different from that of original diversion, (c) applied at a place of use other than the point of original user?

62. (a) Does the right exist in the enumerated cases, if at all, by virtue of statutory permission or as an inherent incident of the property right? (b) If the right exists, is it an absolute or a restricted right? (c) What is the limitation upon the right?

63. What, in general, constitutes such injury in the eyes of the law as will result in a denial of the right to change the character, or place of use, or point of diversion? State the general rule of law, if any there be, defining such injury.

64. Upon whom rests the burden, in a proceeding praying change of purpose or place of use, or of point of diversion, of showing injury or absence of injury to other appropriators?

65. In a suit for change of point of diversion, will a greater diversion ever be allowed, either as to time or quantity, at the new point of diversion, than was made at the old point of diversion? State the objection most generally raised

against the granting of a petition for change of point of diversion.

66. Is it a test either of the right to change purpose or place of use, or point of diversion, that a larger acreage will be served by the same water supply after the change than before?
67. Enumerate ways in which water rights, after the acquisition by appropriation thereof, may be lost to the owner otherwise than by voluntary sale and transfer.
68. Define abandonment.
69. State the elements necessary to establish abandonment, and explain how abandonment is manifested.
70. (a) Does non-user of water constitute abandonment? (b) Is there a presumption of abandonment from non-use? (c) What is the general presumption in regard to the relinquishment of a valuable right?
71. May non-user of the water for an unreasonable length of time raise any presumption against the owner? If so, what is the presumption?
72. Is there any analogy or relation between the rule of diligence in the acquisition of water rights, and the non-user of an appropriation for a period of time, in relation to the question of abandonment?
73. Upon whom rests the burden of proof upon the issue of abandonment being raised?
74. What is the effect of abandonment? To whose benefit does an abandonment inure?
75. May one, by making adverse use of a water right under color of title, acquire a prescriptive right as against the owner? In such case is the old title destroyed and a new title created, or is the old title transferred by operation of law against the consent of the former owner?
76. Distinguish fully between prescription and appropriation.
77. Define estoppel. May the rights of an appropriator be impaired or lost by an estoppel against him?
78. Do the titles to water rights appear upon the public records, in the first instance, as in the case of lands and tenements generally? If not, why not?
79. What statutes have been enacted in the arid states providing for the filing of sworn statements of claim with certain

officers? What is the effect of such statements, and do they constitute final and conclusive record evidence of title?

80-81. (a) What were the early methods adopted for the determination of titles in water rights? (b) Were those methods adequate, and how was the jurisdiction determined and exercised?

82. What fundamental difficulties in the way of the quiet, definite, and lawful enjoyment of rights acquired by appropriation were felt by the early settlers under the loose methods practiced?

83. What general provisions were covered by statutory enactments in relation to water rights? Is such legislation declaratory and regulative only, or does it grant new rights?

84. State the purpose of a general statutory adjudication of water rights. How are such proceedings initiated and prosecuted?

85. Is the proceeding a special one not provided for or governed by codes of civil procedure generally? What is the nature of such adjudication: in personam, quasi in rem, or in rem?

86. What parties are required to participate in the proceedings? What character of proof may they offer? Before whom may the proof be made?

87. Is the decree rendered a general one covering all the issues raised by all the parties? State in general what provisions the decree should contain.

88. Does the decree initiate and grant new rights or titles, or merely embody perpetual record evidence of rights already acquired? May an appropriation be awarded for water in excess of that actually applied to beneficial use? What sources of water supply, in addition to the main stream, are embraced in the decree?

89. Does the decree become final, (a) as against parties within the district, (b) as against parties outside the district and on the same stream?

90. Even when rights were ascertained and defined by courts of chancery, was the enjoyment of the rights by the appropriator assured among the early settlers?

91. What plan of distribution early grew up to insure peaceful enjoyment of rights? Did it prove successful?

92. What statutory method, if any, has been provided for the distribution through public authority of the waters of the public streams? Enumerate the officers in charge. State the general framework of the system of statutory control provided.
93. Define powers and duties of the water commissioner.
94. Define powers and duties of the division engineer.
95. Define powers and duties of the state engineer.
96. How does the state justify its interference with, and control over, these private property rights?
97. What are the appliances usually necessary in reducing the water to possession and utilizing it by application to beneficial uses?
98. Describe generally the method of diversion of water from the main stream so as to apply it to beneficial use upon the individual farms in the area irrigated.
99. Where immediate need does not require the use of the water, what appliances and methods are employed for the saving and utilization of the water when needed later?
100. (a) For what two purposes are dams constructed in a stream? (b) Suppose A, by a dam constructed in the stream, diverts water through his ditch and applies it to beneficial use, while B, by a dam constructed in the river, impounds the water in the channels thereof, and months later diverts and applies the water so stored to beneficial use. Has B made as perfect an appropriation as A?
101. (a) In what way are rights of way for canals and ditches and the land embraced in reservoir sites secured, as against an owner or owners unwilling to sell? (b) What principle justifies the taking of private property in such case without the owner's consent?
102. (a) What is the rule of liability imposed by the law upon the owner of ditch or reservoir appliances for injury resulting from the escape of water from the ditch or reservoir of such owner? (b) Suppose water escapes from a ditch or reservoir owned by A, injuring the lands of B, owing to the following causes: (1) defective construction by contractor without knowledge of A; (2) defective construction known to A; (3) defective construction which A is negligent in not knowing of; (4) imperfect repairs not

known to A; (5) negligent repairs known to A; (6) faulty repairs which A is negligent in not knowing of; (7) original construction made with all reasonable foresight; (8) original construction perfect, escape of waters caused by "act of God"; (9) seepage. In what cases, if any, is A liable to B in damages?

103. (a) What was the character of the original enterprises for the irrigation of lands, and where were they situated with reference to the natural stream? (b) With the fuller development of the country and the necessity of larger enterprises to reclaim large bodies of land situated upon the higher levels and farther away from the streams, what two principal methods of ownership and control have been utilized?

104. Into what classes may the private irrigation companies be roughly grouped?

105. (a) What is meant by the term "quasi-public carriers"? (b) Describe briefly the method of conducting the business practiced by a company engaged as a quasi-public carrier.

106. What is meant by the term "mutual ditch company"? State the method of doing business used by such companies.

107. (a) May ditch companies appropriate water? If so, in what capacity are the appropriations acquired and held by the company? (b) In general, does the ditch company act in all matters for its stockholders in acquiring and protecting rights to the use of water, (1) where the water rights are represented by the stock of the corporation, (2) where the water rights are conveyed by deed or contract of the company?

108. (a) What is meant by the term "irrigation districts"? May these be organized with or without legislative consent? In which of the following classes do such corporations belong: (1) private; (2) public; (3) quasi-municipal; (4) municipal? (b) State the general process of organization, the method of government, and their power to incur indebtedness for the construction of irrigation works.

QUIZ QUESTIONS

LAW OF MINES AND MINING

1. Give a brief outline of the origin, growth and development of mining law in the United States.
2. How does the mining law in the original states and Texas differ from the mining law of the remainder of the United States?
3. Does the general federal mining law apply to the states of the Middle West?
4. Where is the federal system of "American Mining Law" in force?
5. Into what chronological periods is the mining law of the United States naturally divided?
6. What provision relating to mines was inserted in most of the Royal Charters?
7. How did Congress legislate regarding the lead and copper mines of the Middle West? Was leasing of mineral lands considered a success?
8. What steps did the government take regarding the control of mining on public land in the early days following the discovery of gold?
9. Describe the origin and growth of the miners' customs and regulations in early days.
10. How were the mining districts organized and what was the nature of the rules adopted in most of them?
11. What was the attitude of the courts and the state legislatures toward these mining districts?
12. What is the date of the first general federal mining act and has it any present practical importance?
13. What are the main characteristics of the Act of 1866?
14. What are the main features of the Federal Act of 1870?

15. What is the date of the federal mining act now in force in the West?
16. What are the main points of distinction between the Act of 1866 and the Act of 1872?
17. In what respect did the Act of 1872 change the placer mining law?
18. What other significant provisions were included in the Act of 1872?
19. Of what specific elements is the American Mining Law composed?
20. How was the public land within the original states owned and what constitutes the public domain of the United States?
21. When the United States acquired title to its public domain, what became of the grants included therein previously made by former sovereigns? Were minerals excepted from these grants?
22. Has the public domain ever been disposed of by auction?
23. What are pre-emption claims?
24. Describe the different kinds of homesteads.
25. What are the main features of the Timber and Stone Act?
26. How are desert lands acquired?
27. What are railroad grants?
28. How are town sites acquired?
29. What is scrip as applied to public land?
30. Name some special reservations of public land which are devoted to governmental purposes.
31. How are coal lands disposed of?
32. What is the nature of the grants made by the federal government to the states?
33. What is a land patent? Does a patent to agricultural lands convey minerals existing in such lands?
34. (a) What terms are used in the various mining acts to express the idea of mineral lands, and what is the meaning of the word "mineral" as used in these acts?
    (b) What are the tests usually employed to determine whether lands are mineral in character?
35. Give a list of non-metallic substances which have been held to be mineral in character.
36. Into what two broad divisions are mineral lands classified?

37. (a) Who may acquire rights to public mineral lands?
    (b) May a minor locate a mining claim?
38. (a) What is the status of a location made by an alien?
    (b) Does the conveyance to a citizen of a location made by an alien alter the situation?
39. From a geological standpoint, how are veins classified and described?
40. (a) How have veins or lodes been defined from the judicial standpoint?
    (b) Illustrate by examples of mineral deposits which have been held to be included within the term "vein or lode."
41. What is rock in place within the meaning of the statute?
42. What character of mineral deposit may be located as a lode?
43. What are the different meanings of the word "location"?
44. What are the requirements of location contained in the federal statutes?
45. In what respect has state legislation supplemented the federal requirements?
46. Why is a discovery of mineral required and how essential is it to the validity of the location?
47. What kind of a discovery is necessary in the case of a lode claim? What is the ordinary test applied as to the sufficiency of a discovery?
48. (a) On what portion of the vein must the discovery be made and in what part of the claim?
    (b) If two adjoining lode locations are staked out by the same person and a discovery is made on one of them of a gold-bearing vein of quartz at a point but three or four feet distant from where the vein would normally cross into the other location, but the vein is not in evidence in the other location, being covered to a depth of several feet by loose slide material, will the one discovery suffice to validate both locations?
    (c) If A owning a senior claim allows his only point of discovery to be patented by its being inadvertently included in the conflict area of a junior location, what effect will this loss of discovery have on the senior claim?
49. What length of time may a locator take for marking a discovery?

50. (a) Prior to discovery of minerals, what is the status of the location?

(b) If, after A has staked out a claim and performed the other acts of location excepting the making of a discovery, B enters into possession of another portion of the ground so staked by A and also stakes out a location identical with A's, and B makes the first dicovery, which one is entitled to the ground?

51. What is a discovery shaft and what are the usual requirements relating to such a shaft?

52. (a) What is the object of posting a notice of location on the claim?

(b) Is such a notice essential to the validity of the location?

(c) What facts are such notices ordinarily required to contain?

(d) Write out a brief location notice containing the main essentials.

53. (a) What is the object of requiring a notice of location to be recorded?

(b) Is recording a requisite of a valid location?

(c) What facts must a recorded notice contain?

54. With what accuracy must the claim be described in the recorded notice of location?

55. (a) What is the character of the marking or staking of the location on the ground required by the mining law?

(b) What is the maximum size of a lode location?

56. How long a time may a locator take to mark his location?

57. (a) What sort of corner monuments are customary in the mining districts?

(b) What is the effect of allowing the corner monuments to become obliterated?

58. If A makes a valid location and while it is still valid and existing, B makes another location covering all or a portion of the same ground, then, if A's location thereafter terminates either by abandonment or forfeiture through failure to perform assessment work, and C still later includes in a third location the ground originally included in and common to A's and B's locations, to whom does the conflict area belong, to B or to C?

59. (a) What is the object of the end lines of a lode location and what position should they occupy with respect to the side lines and to each other?
(b) How do broken end lines affect the rights ordinarily attaching to a lode location?
60. (a) How is the position of the side lines of a lode location usually determined?
(b) Do broken side lines have any effect on the validity of the location?
61. What are side-end lines?
62. (a) A stakes out a location 1900 feet in length. How does this affect the validity of his location?
(b) If, after a location which does not exceed 1500 x 600 ft. has been staked in good faith by A, it is discovered that the apex of the vein departs materially from the center line of the claim so that a large portion of the surface area of the claim is more than 300 feet from the vein apex, can B lawfully locate such portion of the surface area on the theory that it is in excess of what A may rightfully claim?
63. (a) Define the apex of a vein.
(b) Why is the position of the apex within the lode claim of importance?
(c) What is a blind apex?
64. What is the dip of a vein?
65. What is the strike of a vein and what relation does the strike bear to the dip?
66. (a) Define extralateral right.
(b) What determines the extent of the extralateral right in any particular case?
67. What was the character of the extralateral right granted by the Act of 1866?
68. When the end lines of an 1866 location are parallel, how is the extralateral right defined?
69. When the end lines of an 1866 location converge in the direction of the dip of the vein, how have the courts decided that the extralateral right shall be measured?
70. When the end lines of an 1866 location diverge in the direction of the dip of the vein, how is the extralateral right measured?

71. What is the character of the extralateral right granted under the Act of 1872 and how does it differ from that granted by the Act of 1866?
72. When end lines of an 1872 location are parallel and the apex of the vein extends from end line to end line, how is the extralateral right defined?
73. When the end lines of an 1872 location converge in the direction of the dip of the vein, how is the extralateral right defined?
74. When the end lines of an 1872 location diverge in the direction of the dip of the vein, how does this affect the extralateral right?
75. Where the apex of the vein crosses an end line of an 1872 location and instead of extending through the location to the other end line, departs through one of the side lines, how is the extralateral right measured?
76. (a) When the apex of the vein crosses both side lines of a location, how does this affect the exercise of an extralateral right?
    (b) Does it make any difference whether the side lines are parallel or not?
77. When the apex of the vein enters and departs through the same side line without crossing either end line, how is the extralateral right affected?
78. When the vein enters through one end line but terminates within the claim, what is the measure of the extralateral right?
79. (a) What are secondary veins?
    (b) When the secondary and primary veins have the same extent through the claim, how are the extralateral rights on the secondary vein measured?
80. (a) What is the measure of the extralateral right on a secondary vein, the apex of which does not have the same direction and extent within the claim as the apex of the discovery vein?
    (b) Where the apex of the discovery vein crosses both end lines of the claim and the apex of a secondary vein crosses both side lines, can an extralateral right be exercised on the secondary vein?

81. When the apex of a broad lode is bisected by the side line common to two claims, has the junior claim any extralateral right, and if so, how is it measured?
82. When the extralateral sweep or segment of a vein apexing in the junior claim is intersected on its dip by the extralateral sweep of a senior claim located on another portion of the apex of the same vein, how are the respective extralateral rights of the two claims measured?
83. When a vein near the surface divides or splits and has two branches apexing in two different claims and when these branches unite in depth and form a single vein, which claim is entitled to the entire vein below the junction?
84. (a) A vein apexes in a junior location, but on its dip passes beneath the surface of a patented senior claim, has the junior claimant a right to mine on the dip of the vein beneath the senior surface? (b) Would the case be altered if the vein dipped beneath agricultural land patented prior to the making of the mining location?
85. What must the owner of the apex of a vein prove in order to justify his right to mine beneath the surface of adjoining ground owned by another?
86. What is a placer? Give some examples of placer deposits.
87. What are the usual requirements for a placer location?
88. What is the character of discovery required in the case of a placer location?
89. What can you say of the necessity of staking a placer claim?
90. What are association placers and what is the maximum area allowed for a single location?
91. If only five out of the eight names appearing on a placer location of the maximum area are those of persons who are actually in good faith interested in the location, what effect will this have on the validity of the location?
92. (a) What should the notice of location of a placer claim contain?
    (b) Write out a brief notice of location of a placer claim.
93. What are the usual requirements regarding the recording of a notice of location of a placer claim?

94. Is it customary to require discovery work to be performed by the locators of placer locations?

95. (a) Do placer locations have to conform to legal subdivisions?
(b) Is there any exception to the rule?

96. When a placer location is found to be excessive in area can the person who discovers the excess locate adversely any part of the excessive placer location that he chooses?

97. How is the tunnel right acquired and what is the nature and extent of the tunnel right?

98. (a) What is a mill site? (b) What are the two classes of mill sites?

99. What is the character of the improvements required to validate a mill site of the first class?

100. What kind of improvements must be placed on a mill site of the second class?

101. Under what circumstances and for what purposes may locations be amended?

102. (a) What is a relocation as distinguished from an amended location? (b) May a locator relocate his location in order to avoid performing annual labor? (c) If B includes in his location a portion of A's location, which latter location is at the time of B's location a valid and existing claim, and A later abandons the senior location, does the conflict area become B's without further action on his part?

103. What is annual labor?

104. What are the provisions of the federal statutes with regard to annual labor?

105. (a) Can annual labor be performed during the calendar year in which the location is made so as to satisfy the statutory requirement for work for the year following?
(b) If A fails to perform his annual labor during the year but commences work on the last day of the year and prosecutes it thereafter with due diligence, is a location of the ground made by B on January 1st of any effect?

106. (a) What sort of work and labor will satisfy the statute?
(b) Cite examples of work and labor that have been held to be unsatisfactory.

107. What is meant by group work and what must be the nature of the work to be applicable to a group of claims?

108. A hired B to perform the annual labor on A's mining location and paid him $100 for doing so. It turned out subsequently that B had only performed work of a value of fifty dollars. A's location was relocated the following year by a third party. Was A's claim forfeited or will his payment to B of the full amount required to complete the work relieve him of the forfeiture?
109. What is a proof of labor and what is the value of recording such a proof?
110. A located a mining claim and after performing work and labor on it carefully for two years left it for five years without doing any annual labor, but before B could make an adverse location A resumed work again. Is an adverse location by B of any value after A performed $100 worth of labor for that current year?
111. How are forfeiture and abandonment to be distinguished?
112. What method of getting rid of delinquent co-owners is open to one of the owners of a mining location who performs or pays for the annual labor necessary to keep the claim alive and valid?
113. What is the nature of the title created by a location?
114. Wherein does a patent title differ from a location title?
115. Outline briefly the procedure for obtaining a patent to a mining location.
116. What is the effect on the patent proceeding of the filing of an adverse claim?
117. What is the function of a protest and where is the hearing on the protest held?
118. Do mining contracts differ from ordinary contracts?
119. (a) What is a grubstake contract? (b) If, after A has located a mining claim in the joint interest of himself and B in pursuance of a grubstake contract, A operates the property, can he claim that he is doing so under the grubstake contract?
120. (a) What provisions are ordinarily incorporated in an option or working bond on a mine? (b) What are some of the rules of construction peculiar to such contracts?
121. How do mining leases differ from licenses to mine?
122. Suppose that B enters into possession of oil-bearing property under a lease from A, but fails to carry on the work

of drilling for and producing oil with reasonable diligence, can B successfully defend a suit brought by A to declare the lease forfeited?

123. If A, B and C enter into a mining partnership and work a property owned in common and A dies while B sells his interest in the partnership and C is declared a bankrupt, does the partnership become dissolved?

124. (a) What is the usual object of an injunction in mining litigation? (b) What must the plaintiff establish to secure an injunction preventing the defendant from working the property in dispute?

125. Is it customary to allow parties to mining litigation to inspect each other's properties?

126. If A in the course of conducting mining operations approaches the boundary plane between his own and B's claim and is negligent about mining across this plane and on several occasions crosses into B's territory, what is the usual measure of damages under such circumstances?

127. If A has no reasonable means of knowing that B has crossed the boundary plane between A's and B's mining property and A does not discover the existence of the trespass until several years after the Statute of Limitations would normally have run for a trespass, may A upon discovering the trespass recover the value of ore extracted by B or can B successfully assert that the Statute of Limitations has long since run?

TABLE OF CONTENTS

LEADING ILLUSTRATIVE CASES

(The figures refer to those at the foot of the pages. All Leading Illustrative Cases cited in the text are included in the following chapters.)

LAW OF DESCENT AND DISTRIBUTION WILLS AND ADMINISTRATION GUARDIAN AND WARD

PART I.

DESCENT AND DISTRIBUTION.

CHAPTER I.

DESCENT.

TITLE OF CASE — PAGE

Fred Opel v. Anna Shoup et al..... 521

PART II.

WILLS AND ADMINISTRATION.

DIVISION I.

HISTORY AND NATURE IN GENERAL.

CHAPTER IV.

ORIGIN, HISTORY AND NATURE OF WILLS.

Cummings v. Lohr..... 528

DIVISION II.

THE EXECUTION, REVOCATION, REVIVAL AND REPUBLICATION OF WILLS.

CHAPTER VII.

THE EXECUTION OF WILLS.

TITLE OF CASE	PAGE
In Re Tyner's Estate	531
Karsten v. Karsten	536
Albright et al. v. North et al	541
Bryan's Appeal	548
Sears v. Dillingham	553
In Re Claflin's Will	557
Cunningham v. Cunningham et al	565
In Re Beggans' Will	571

CHAPTER VIII.

REVOCATION OF WILLS.

Simpson v. Foxon	574
Miles' Appeal	577
In Re Kissam's Will	583
Ladd's Will	586
In Re Knapen's Will	595
Durfee v. Risch	599

CHAPTER IX.

REPUBLICATION AND REVIVAL.

Stetson v. Stetson	602

PART III.

PROBATE OF WILLS AND ADMINISTRATION OF ESTATES.

DIVISION I.

DECEDENTS' ESTATES.

CHAPTER XII.

IN GENERAL.

TITLE OF CASE PAGE
Richards v. Pierce 612

CHAPTER XIII.

ADMINISTRATION.

Brown v. Baxter et al 616
Scott v. McNeal et al 619
In Re Zeph's Estate 633
Johnson v. Johnson 635
Bradshaw v. Lancashire & Y. Ry 637

DIVISION II.

GUARDIAN AND WARD.

CHAPTER XIV.

DEFINITIONS AND GENERAL PRINCIPLES.

In the matter of Ichabod Andrews, an Infant 642
Taff v. Hosmer 643
In the matter of the Guardianship of Laura Danneker, a Minor 647
State v. Clark 650

LAW OF LANDLORD AND TENANT

CHAPTER I.

THE TENANCY.

TITLE OF CASE — PAGE

Talamo v. Spitzmiller 653

CHAPTER II.

THE RELATION OF LANDLORD AND TENANT.

Davis v. Williams 657
Story v. McCormick 661

CHAPTER III.

LEASES.

Baer v. Minock 667
Matthews v. Carlton 669

CHAPTER IV.

CONDITIONS, RESERVATIONS, AND EXCEPTIONS.

Frank v. Stratford-Handcock 671

CHAPTER V.

COVENANTS.

Daly v. Wise 674
Ingalls v. Hobbs 678

CHAPTER VI.

FIXTURES.

Canning v. Owen 682
Mueller v. Chicago, M. & St. P. Ry. Co 689

CHAPTER VII.

THE LANDLORD'S RIGHTS, DUTIES AND LIABILITIES.

TITLE OF CASE PAGE
Borggard v. Gale 692
Darlington v. De Wald 694

CHAPTER VIII.

THE TENANT'S RIGHTS, DUTIES AND LIABILITIES.

Nicrosi v. Phillipi 698
Gay v. Davey 701

CHAPTER IX.

RENT.

Herter v. Mullen 706

CHAPTER X.

TERMINATION OF TENANCY.

Hunter v. Frost 718

LAW OF IRRIGATION AND WATER RIGHTS

CHAPTER II.

RIGHTS OF APPROPRIATION OF WATER.

TITLE OF CASE — PAGE

Union Mill & Mining Co. v. Dangberg 725

CHAPTER III.

WATER SUPPLIES SUBJECT TO APPROPRIATION.

Rait v. Furrow 740

CHAPTER IV.

HOW APPROPRIATIONS ARE MADE.

Fort Morgan Land & Canal Co. v. South Platte Ditch Co.. 746
Sieber v. Frink 749

CHAPTER V.

WATER AND WATER RIGHTS AS PROPERTY.

Farm Investment Co. v. Carpenter 752
Winters v. United States 759
Combs v. Agricultural Ditch Co 760
New Cache La Poudre Irr. Co. v. Water Supply & Storage Co. 766

CHAPTER VI.

EXTINGUISHMENT OF WATER RIGHTS.

Utt v. Frey 770

CHAPTER VIII.

THE CONSTRUCTION AND CORPORATE MANAGEMENT OF WATERWORKS.

Charnock v. Higuerra 775

LAW OF MINES AND MINING

CHAPTER III.

MINERAL LANDS AND THOSE WHO MAY ACQUIRE RIGHTS TO THEM.

TITLE OF CASE — PAGE

Davis v. Wiebbold 781
Chrisman v. Miller 793

CHAPTER IV.

VEINS OR LODES AND THEIR LOCATION.

Lawson v. United States Mining Co 794
Farrell v. Lockhart 801

CHAPTER V.

THE EXTRALATERAL RIGHT.

Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co. 807

CHAPTER VI.

THE LOCATION OF PLACERS, TUNNEL RIGHTS AND MILL SITES.

Creede & Cripple Creek M. & M. Co. v. Uinta Tunnel Min. & Trans. Co. 832

CHAPTER VII.

AMENDED LOCATIONS—RELOCATIONS AND ANNUAL LABOR.

Swanson v. Sears 850

CHAPTER X.

SPECIAL REMEDIES AND MISCELLANEOUS MATTERS.

Lightner Mining Co. v. Lane 852

LEADING ILLUSTRATIVE CASES LAW OF DESCENT AND DISTRIBUTION WILLS AND ADMINISTRATION GUARDIAN AND WARD

PART I

DESCENT AND DISTRIBUTION

CHAPTER I.

DESCENT.

FRED OPEL v. ANNA SHOUP ET AL.

100 Iowa 407, 37 L. R. A. 583. 1897.

Appeal by defendants from a decree of the District Court for Johnson County in favor of plaintiff in a proceeding to enforce plaintiff's right to a share in the property which had been left by Elizabeth Hormel, deceased, at the time of her death intestate. Affirmed.

GIVEN, J., delivered the opinion of the court. * * * * * * Elizabeth Hormel was a citizen of the United States, and a resident of the state of Iowa, at the time of her death. In the few months that transpired between the death of her husband and her own death, she had not elected whether she would take under his will or under the statutes, but it is not questioned but that she died seized of an undivided half of the real estate in controversy, and that her interest passed to her next of kin legally qualified to inherit the same, immediately upon her death. She died without issue, leaving as her only parent surviving her her mother, Elizabeth Opel, a nonresident alien, residing in Bavaria, Germany. Elizabeth Opel died intestate, in Bavaria, on May 12, 1894, leaving as

her next of kin surviving her, her children, John Opel, Sr., and Barbara Degleman, both nonresident aliens, and the plaintiff, Fred Opel, a citizen of the United States, and resident of the state of Iowa. The plaintiff, Fred Opel, contends that he is entitled to inherit the undivided one-half of said real estate from his sister Elizabeth Hormel, either solely or with his said brother and sister. It is contended on behalf of the heirs of John C. Hormel that neither the plaintiff nor the other children of Elizabeth Opel are entitled to so inherit, and that, therefore, no heirs of Elizabeth Hormel being found legally entitled to inherit said property it goes to the heirs of her deceased husband, John C. Hormel, under § 2458 of the Code of Iowa.

Leaving out of consideration the fact of alienage, it would not be questioned but that upon her death the estate of Mrs. Hormel vested in her mother, and, upon her death in her children, Fred Opel, John Opel, Sr., and Barbara Delgeman. Chapter 85, Acts 22d Gen. Assem., approved April 9, 1888, provides as follows: "§ 1. Nonresident aliens * * * are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase, or otherwise only as hereinafter provided." An exception is thereinafter provided in favor of "the widow and heirs of aliens who have heretofore acquired lands in this state under the laws thereof"; but this exception does not apply to this case, as Elizabeth Hormel was not an alien. § 2 of said chapter provides as follows: "§ 2. Any nonresident alien may acquire and hold real property to the extent of three hundred and twenty (320) acres, or city property to the amount of $10,000 in value, providing that within five years from the date of purchase of said property the same is placed in the actual possession of a relative of such purchaser, the occupant being related to such owner within the third degree of kindred or the husband or wife of such relative, and naturalized citizen within ten years from the purchase of said property as aforesaid. In Bennett v. Hibbert, 88 Iowa, 155, it is held that "purchase" and "purchaser," as found in this section, include every method of acquiring title to real estate except by descent by operation of law. See Burrow v. Burrow (Iowa), 67 N. W. 287. § 7 of said chapter provides that the act shall not apply to aliens who are residents of the state of Iowa. It is certainly clear that

Mrs. Opel was disqualified from acquiring title to or taking or holding this real estate by descent under the prohibitions of the first section, and that she is not within either of the exceptions made to that prohibition. In Furenes v. Mickelson, 86 Iowa, 508, this court held that a naturalized citizen resident of this state cannot inherit through a father, who is a nonresident alien, the lands of a great uncle, who was a naturalized citizen, "on the ground that a line of inheritance cannot be traced through nonresident aliens," If nothing further appeared, the conclusion would follow from what we have said that the estate did not pass to Elizabeth Opel, and consequently did not pass to her children.

3. On January 21, 1845, there was concluded and adopted between the United States of America and the King of Bavaria, Germany, a treaty, articles 1, 2, and 3 of which are as follows:

"Article 1. Every kind of *droit d'aubaine, droit de retraite,* and *droit de détraction* or tax on emigration, is hereby, and shall remain, abolished between the two contracting parties, their states, citizens, and subjects, respectively.

"Art. 2. Where, on the death of any person holding real property within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a term of two years to sell the same, which term may be reasonably prolonged according to circumstances, and to withdraw the proceeds thereof, without molestation, and exempt from all duties of *détraction.*

"Art. 3. The citizens or subjects of each of the contracting parties shall have the power to dispose of their (real and) personal property within the states of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said (real and) personal property, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases."

The other articles provide for the care of the property in the absence of the heirs, the mode of deciding disputes, that the treaty shall not derogate from the force of laws of Bavaria

to prevent the emigration of the King's subjects, and that the treaty is made subject to the approval of the two governments.

This treaty abolishes, as between these governments and the subjects thereof, "every kind of *droit d'aubaine, droit de retraite,* and *droit de détraction* or tax on emigration." Black's Law Dictionary defines *droit* as equivalent to the English word "right"; and *droit d'aubaine* as, "in French law, a rule by which all the property of a deceased foreigner, whether movable or immovable, was confiscated to the use of the state, to the exclusion of his heirs, whether claiming *ab intestato* or under a will of the deceased." It is this provision of the treaty that we are called upon to consider. Appellants insist that the provisions of the treaty are not applicable in this case; that confiscation was never applied by any government to property of its own deceased citizens; and that the treaty only contemplates the protection of the citizens of either government, who may die having property in the other. The fault of this argument is in assuming that the protection is for the dead, and that the property remains in the deceased. It is conceded that this property vested in some living person immediately upon the death of Mrs. Hormel. If, under the common law, that person was disqualified by alienage from inheriting it, then this treaty applies, and removes that disqualification. In the absence of this treaty, Mrs. Opel was disqualified by alienage from inheriting this property; but by it the disqualification was removed, and therefore the property descended to her. Our inquiry, then, is as to property in Iowa belonging to a resident and subject of Bavaria.

Appellants cite Frederickson v. Louisiana, 64 U. S. 23 How. 445, 16 L. ed. 577. "Fink was a naturalized citizen of the United States at the time of his death, and residing in the city of New Orleans; also, that the legatees resided in the kingdom of Württemberg, and are subjects of the King of Württemberg." We had a treaty with that kingdom similar to that under consideration. Louisiana had a statute providing that "each and every person, not being domiciliated in this state, and not being a citizen of any other state or territory in the Union, who shall be entitled, whether as heirs, legatee, or donee, to the whole or any part of the succession of a person deceased, whether such person shall have died in this state or elsewhere, shall pay a

tax of 10 per cent on all sums, or on the value of all property which he may have actually received from said succession, or so much thereof as is situated in this state, after deducting all debts due by the succession." Rev. Stat. 1876, § 3683. The claim of the state to this tax was resisted, on the ground that it was contrary to the third article of the treaty, and that article alone, and not the second, as in this case, was under consideration. The third article of that treaty relates solely to personal property, and is different in its language from the second, which is identical with the second in this. The court held that the act does not make any discrimination between citizens of the state and aliens in the same circumstances, and sustained the tax as valid. Appellants quote from the opinion as follows: "But we concur with the supreme court of Louisiana in the opinion that the treaty does not regulate the testamentary dispositions of citizens or subjects of the contracting powers in reference to property within the country of their origin or citizenship. The cause of the treaty was that the citizens and subjects of each of the contracting powers were or might be subject to onerous taxes upon property possessed by them within the states of the other by reason of their alienage, and its purpose was to enable such persons to dispose of their property, paying such duties only as the inhabitants of the country where the property lies pay under like conditions. The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, was not in the contemplation of the contracting powers, and is not embraced in this article of the treaty." This view of that treaty is applicable to the one before us, but we fail to see wherein it supports the claim that the facts of this case do not bring it within the provisions of this treaty.

4. Appellants cite authorities to the effect that the states alone have the right to regulate, by legislation, descents and conveyances of real estate within their borders; and from this it is argued that the Federal government has no power, "by treaty, to interfere with the right of the state in regard to the descent of property upon the death of its citizens"; that treaties made without authority are not valid; that this treaty is in conflict with the laws of Iowa, and is therefore of no force or

effect. It may be conceded that the states alone have such power; that they alone may declare to what kindred the estate of persons dying intestate shall descend. It must also be conceded that the Federal government alone has power to treat with other governments as to rights of the citizens of each within the territory of the other. This treaty does not attempt to regulate descents of real property in Iowa. It does not declare that, when a son or daughter dies without issue, the estate shall go to the parents. It is left to the state, and Iowa has so provided. This treaty simply declares that, if that parent is disqualified by alienage, as to the citizens of these two governments this disqualification is removed. In article 6 of the Constitution of the United States it is provided that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or the laws of any state to the contrary notwithstanding." Many cases may be found wherein the courts have enforced treaty stipulations, similar to this, in favor of foreign claimants; but the case of People, Atty. Gen., v. Gerke, 5 Cal. 381, is the first we find wherein the power of the Federal government in this respect was questioned. In that case, Deck, a citizen of Prussia, died in San Francisco, leaving undisposed of a large amount of real property in that state. Article 14 of our treaty with Prussia is the same as article 3 of this treaty. The attorney general, on behalf of the state, denied the power of the Federal government to make such a provision by treaty, and argued, as is done in this case, that to exercise such power would permit the Federal government to control the internal policy of the states, and in cases like this to alter materially the statutes of descent. The court, after an able consideration of the subject, concludes as follows: "I can see no danger which can result from yielding to the Federal government the full extent of powers which it may claim from the plain language, intent, and meaning of the grant under consideration. Upon some subjects the policy of a state government, as shown by her legislation, is dependent upon the policy of foreign governments, and would be readily changed upon the principle of mutual concession. This can

only be effected by the action of that branch of the state sovereignty known as the general government, and when effected, the state policy must give way to that adopted by the governmental agent of her foreign relations." The reasoning and conclusion of the opinion are strongly emphasized by what is added by Justice Ryan. While the question of the power of the Federal government in this respect was not directly passed upon in the following cases, they show that the courts have uniformly enforced such treaties, without doubting the power of the Federal government to make them. * * *

* * * In the recent case of Wunderle v. Wunderle, 144 Ill. 40, 19 L. R. A. 84, the subject of descents and alienage is considered at length, and with marked care and ability, as affected by the common law, and by statutes of the states and by treaties with the United States. In considering the effect of conflicts between the statute of the state and a treaty with the United States, the court, after citing article 6 of the Federal Constitution, says: "In construing this article, it has been held that provisions in regard to the transfer, devise, or inheritance of property are fitting subjects of negotiation and regulation by the treaty-making power of the United States, and that a treaty will control or suspend the statutes of the individual states whenever it differs from them. Hence, if the citizen or subject of a foreign government is disqualified under the laws of a state from taking, holding, or transferring real property, such disqualification will be removed, if a treaty between the United States and such foreign government confers the right to take, hold or transfer real property." If it may be said that chapter 85 of the Acts of the 22d General Assembly is in conflict with said treaty of January 21, 1845, reason and the authorities support the conclusion that the treaty must control.

It follows from the conclusions we have reached that an undivided one-half of the property in question vested in Mrs. Opel upon the death of her daughter, and upon her death it passed to her children, subject to the conditions imposed by said treaty, and that the other undivided one-half passed to the heirs of John C. Hormel, deceased.

The decree of the district court being in harmony with these conclusions, it is affirmed.

PART II

WILLS AND ADMINISTRATION

DIVISION I

HISTORY AND NATURE IN GENERAL

CHAPTER IV.

ORIGIN, HISTORY AND NATURE OF WILLS.

CUMMINGS v. LOHR.

246 Ill. 577. 1910.

DUNN, J., delivered the opinion of the court.

Christian Lohr died on July 18, 1887. His wife, Louisa Lohr, and his children, Amelia Cummings, Henry Lohr and August Lohr, survived him. His will, dated July 21, 1871, was admitted to probate. By it, after providing for the payment of his debts, he disposed of his property as follows: "I give and bequeath to Louisa Lohr, my beloved wife, all the real estate that I may die seized of, being the land that I now live on in said township of Locust, Christian County, Illinois, also all my personal property that I may die seized of, provided she remains my widow, but should she marry, then all the property shall go to my children that are alive, except one-third of the land, which she is to have during her lifetime." At the date of the will Christian Lohr owned the farm mentioned in the will, consisting of 160 acres, and no other real estate. He afterwards acquired, and owned at his death, 17 acres of other land and some town lots in the village of Owaneco. Louisa Lohr, after her husband's death, conveyed one-half of the 160-acre farm to August Lohr and the other half to Henry Lohr, who afterwards conveyed his half to his brother August. The plaintiff in error,

Amelia Cummings, filed a bill against Louisa Lohr, August Lohr and Henry Lohr for the partition of all the real estate, claiming that the will devised only a life estate to Mrs. Lohr in the 160 acres; that the remainder, subject to such life estate, descended to the children, and that the 17 acres and the town lots, acquired after the date of the will, were intestate property, which descended to the heirs subject to the widow's right of dower, if any. The defendants in error answered the bill, claiming that the will devised all the premises to Louisa Lohr in fee simple. They also set up an agreement between the three children and their mother, pursuant to which they aver that an 80-acre tract adjoining the 160-acre farm was purchased for the plaintiff in error and it was agreed that the brothers should have the farm. A cross-bill was also filed, setting up the same agreement and praying that the respective parties be decreed to execute conveyances according to the rights of the parties. The court found that August Lohr was the owner in fee simple of the 160-acre tract, and that the plaintiff in error, August Lohr and Henry Lohr were tenants in common, in fee simple of the 17 acres and the town lots, and decreed that the plaintiff in error convey to August Lohr all the interest she once had in the 160 acres and that partition be made of the residue of the property, subject to the dower of Louisa Lohr. The plaintiff in error insists that the court erred in refusing partition of the 160 acres and in decreeing partition of the other lands subject to dower. By cross-errors the defendants insist that the court erred in decreeing partition of any of the premises.

Section 13 of chapter 30 of the Revised Statutes provides that "every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." The estate devised to Louisa Lohr was therefore an estate in fee simple except as limited by the words, "provided she remains my widow, but should she marry, then all the property shall go to my children that are alive, except one-third of the land, which she is to have during her lifetime." Counsel for plaintiff in error has assumed that the word "provided" has the

PART II

WILLS AND ADMINISTRATION

DIVISION I

HISTORY AND NATURE IN GENERAL

CHAPTER IV.

ORIGIN, HISTORY AND NATURE OF WILLS.

CUMMINGS v. LOHR.

246 Ill. 577. 1910.

DUNN, J., delivered the opinion of the court.

Christian Lohr died on July 18, 1887. His wife, Louisa Lohr, and his children, Amelia Cummings, Henry Lohr and August Lohr, survived him. His will, dated July 21, 1871, was admitted to probate. By it, after providing for the payment of his debts, he disposed of his property as follows: "I give and bequeath to Louisa Lohr, my beloved wife, all the real estate that I may die seized of, being the land that I now live on in said township of Locust, Christian County, Illinois, also all my personal property that I may die seized of, provided she remains my widow, but should she marry, then all the property shall go to my children that are alive, except one-third of the land, which she is to have during her lifetime." At the date of the will Christian Lohr owned the farm mentioned in the will, consisting of 160 acres, and no other real estate. He afterwards acquired, and owned at his death, 17 acres of other land and some town lots in the village of Owaneco. Louisa Lohr, after her husband's death, conveyed one-half of the 160-acre farm to August Lohr and the other half to Henry Lohr, who afterwards conveyed his half to his brother August. The plaintiff in error,

Amelia Cummings, filed a bill against Louisa Lohr, August Lohr and Henry Lohr for the partition of all the real estate, claiming that the will devised only a life estate to Mrs. Lohr in the 160 acres; that the remainder, subject to such life estate, descended to the children, and that the 17 acres and the town lots, acquired after the date of the will, were intestate property, which descended to the heirs subject to the widow's right of dower, if any. The defendants in error answered the bill, claiming that the will devised all the premises to Louisa Lohr in fee simple. They also set up an agreement between the three children and their mother, pursuant to which they aver that an 80-acre tract adjoining the 160-acre farm was purchased for the plaintiff in error and it was agreed that the brothers should have the farm. A cross-bill was also filed, setting up the same agreement and praying that the respective parties be decreed to execute conveyances according to the rights of the parties. The court found that August Lohr was the owner in fee simple of the 160-acre tract, and that the plaintiff in error, August Lohr and Henry Lohr were tenants in common, in fee simple of the 17 acres and the town lots, and decreed that the plaintiff in error convey to August Lohr all the interest she once had in the 160 acres and that partition be made of the residue of the property, subject to the dower of Louisa Lohr. The plaintiff in error insists that the court erred in refusing partition of the 160 acres and in decreeing partition of the other lands subject to dower. By cross-errors the defendants insist that the court erred in decreeing partition of any of the premises.

Section 13 of chapter 30 of the Revised Statutes provides that "every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." The estate devised to Louisa Lohr was therefore an estate in fee simple except as limited by the words, "provided she remains my widow, but should she marry, then all the property shall go to my children that are alive, except one-third of the land, which she is to have during her lifetime." Counsel for plaintiff in error has assumed that the word "provided" has the

PART II

WILLS AND ADMINISTRATION

DIVISION I

HISTORY AND NATURE IN GENERAL

CHAPTER IV.

ORIGIN, HISTORY AND NATURE OF WILLS.

CUMMINGS v. LOHR.

246 Ill. 577. 1910.

DUNN, J., delivered the opinion of the court.

Christian Lohr died on July 18, 1887. His wife, Louisa Lohr, and his children, Amelia Cummings, Henry Lohr and August Lohr, survived him. His will, dated July 21, 1871, was admitted to probate. By it, after providing for the payment of his debts, he disposed of his property as follows: "I give and bequeath to Louisa Lohr, my beloved wife, all the real estate that I may die seized of, being the land that I now live on in said township of Locust, Christian County, Illinois, also all my personal property that I may die seized of, provided she remains my widow, but should she marry, then all the property shall go to my children that are alive, except one-third of the land, which she is to have during her lifetime." At the date of the will Christian Lohr owned the farm mentioned in the will, consisting of 160 acres, and no other real estate. He afterwards acquired, and owned at his death, 17 acres of other land and some town lots in the village of Owaneco. Louisa Lohr, after her husband's death, conveyed one-half of the 160-acre farm to August Lohr and the other half to Henry Lohr, who afterwards conveyed his half to his brother August. The plaintiff in error,

Amelia Cummings, filed a bill against Louisa Lohr, August Lohr and Henry Lohr for the partition of all the real estate, claiming that the will devised only a life estate to Mrs. Lohr in the 160 acres; that the remainder, subject to such life estate, descended to the children, and that the 17 acres and the town lots, acquired after the date of the will, were intestate property, which descended to the heirs subject to the widow's right of dower, if any. The defendants in error answered the bill, claiming that the will devised all the premises to Louisa Lohr in fee simple. They also set up an agreement between the three children and their mother, pursuant to which they aver that an 80-acre tract adjoining the 160-acre farm was purchased for the plaintiff in error and it was agreed that the brothers should have the farm. A cross-bill was also filed, setting up the same agreement and praying that the respective parties be decreed to execute conveyances according to the rights of the parties. The court found that August Lohr was the owner in fee simple of the 160-acre tract, and that the plaintiff in error, August Lohr and Henry Lohr were tenants in common, in fee simple of the 17 acres and the town lots, and decreed that the plaintiff in error convey to August Lohr all the interest she once had in the 160 acres and that partition be made of the residue of the property, subject to the dower of Louisa Lohr. The plaintiff in error insists that the court erred in refusing partition of the 160 acres and in decreeing partition of the other lands subject to dower. By cross-errors the defendants insist that the court erred in decreeing partition of any of the premises.

Section 13 of chapter 30 of the Revised Statutes provides that "every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." The estate devised to Louisa Lohr was therefore an estate in fee simple except as limited by the words, "provided she remains my widow, but should she marry, then all the property shall go to my children that are alive, except one-third of the land, which she is to have during her lifetime." Counsel for plaintiff in error has assumed that the word "provided" has the

PART II

WILLS AND ADMINISTRATION

DIVISION I

HISTORY AND NATURE IN GENERAL

CHAPTER IV.

ORIGIN, HISTORY AND NATURE OF WILLS.

CUMMINGS v. LOHR.

246 Ill. 577. 1910.

DUNN, J., delivered the opinion of the court.

Christian Lohr died on July 18, 1887. His wife, Louisa Lohr, and his children, Amelia Cummings, Henry Lohr and August Lohr, survived him. His will, dated July 21, 1871, was admitted to probate. By it, after providing for the payment of his debts, he disposed of his property as follows: "I give and bequeath to Louisa Lohr, my beloved wife, all the real estate that I may die seized of, being the land that I now live on in said township of Locust, Christian County, Illinois, also all my personal property that I may die seized of, provided she remains my widow, but should she marry, then all the property shall go to my children that are alive, except one-third of the land, which she is to have during her lifetime." At the date of the will Christian Lohr owned the farm mentioned in the will, consisting of 160 acres, and no other real estate. He afterwards acquired, and owned at his death, 17 acres of other land and some town lots in the village of Owaneco. Louisa Lohr, after her husband's death, conveyed one-half of the 160-acre farm to August Lohr and the other half to Henry Lohr, who afterwards conveyed his half to his brother August. The plaintiff in error,

Amelia Cummings, filed a bill against Louisa Lohr, August Lohr and Henry Lohr for the partition of all the real estate, claiming that the will devised only a life estate to Mrs. Lohr in the 160 acres; that the remainder, subject to such life estate, descended to the children, and that the 17 acres and the town lots, acquired after the date of the will, were intestate property, which descended to the heirs subject to the widow's right of dower, if any. The defendants in error answered the bill, claiming that the will devised all the premises to Louisa Lohr in fee simple. They also set up an agreement between the three children and their mother, pursuant to which they aver that an 80-acre tract adjoining the 160-acre farm was purchased for the plaintiff in error and it was agreed that the brothers should have the farm. A cross-bill was also filed, setting up the same agreement and praying that the respective parties be decreed to execute conveyances according to the rights of the parties. The court found that August Lohr was the owner in fee simple of the 160-acre tract, and that the plaintiff in error, August Lohr and Henry Lohr were tenants in common, in fee simple of the 17 acres and the town lots, and decreed that the plaintiff in error convey to August Lohr all the interest she once had in the 160 acres and that partition be made of the residue of the property, subject to the dower of Louisa Lohr. The plaintiff in error insists that the court erred in refusing partition of the 160 acres and in decreeing partition of the other lands subject to dower. By cross-errors the defendants insist that the court erred in decreeing partition of any of the premises.

Section 13 of chapter 30 of the Revised Statutes provides that "every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." The estate devised to Louisa Lohr was therefore an estate in fee simple except as limited by the words, "provided she remains my widow, but should she marry, then all the property shall go to my children that are alive, except one-third of the land, which she is to have during her lifetime." Counsel for plaintiff in error has assumed that the word "provided" has the

PART II

WILLS AND ADMINISTRATION

DIVISION I

HISTORY AND NATURE IN GENERAL

CHAPTER IV.

ORIGIN, HISTORY AND NATURE OF WILLS.

CUMMINGS v. LOHR.

246 Ill. 577. 1910.

DUNN, J., delivered the opinion of the court.

Christian Lohr died on July 18, 1887. His wife, Louisa Lohr, and his children, Amelia Cummings, Henry Lohr and August Lohr, survived him. His will, dated July 21, 1871, was admitted to probate. By it, after providing for the payment of his debts, he disposed of his property as follows: "I give and bequeath to Louisa Lohr, my beloved wife, all the real estate that I may die seized of, being the land that I now live on in said township of Locust, Christian County, Illinois, also all my personal property that I may die seized of, provided she remains my widow, but should she marry, then all the property shall go to my children that are alive, except one-third of the land, which she is to have during her lifetime." At the date of the will Christian Lohr owned the farm mentioned in the will, consisting of 160 acres, and no other real estate. He afterwards acquired, and owned at his death, 17 acres of other land and some town lots in the village of Owaneco. Louisa Lohr, after her husband's death, conveyed one-half of the 160-acre farm to August Lohr and the other half to Henry Lohr, who afterwards conveyed his half to his brother August. The plaintiff in error,

Amelia Cummings, filed a bill against Louisa Lohr, August Lohr and Henry Lohr for the partition of all the real estate, claiming that the will devised only a life estate to Mrs. Lohr in the 160 acres; that the remainder, subject to such life estate, descended to the children, and that the 17 acres and the town lots, acquired after the date of the will, were intestate property, which descended to the heirs subject to the widow's right of dower, if any. The defendants in error answered the bill, claiming that the will devised all the premises to Louisa Lohr in fee simple. They also set up an agreement between the three children and their mother, pursuant to which they aver that an 80-acre tract adjoining the 160-acre farm was purchased for the plaintiff in error and it was agreed that the brothers should have the farm. A cross-bill was also filed, setting up the same agreement and praying that the respective parties be decreed to execute conveyances according to the rights of the parties. The court found that August Lohr was the owner in fee simple of the 160-acre tract, and that the plaintiff in error, August Lohr and Henry Lohr were tenants in common, in fee simple of the 17 acres and the town lots, and decreed that the plaintiff in error convey to August Lohr all the interest she once had in the 160 acres and that partition be made of the residue of the property, subject to the dower of Louisa Lohr. The plaintiff in error insists that the court erred in refusing partition of the 160 acres and in decreeing partition of the other lands subject to dower. By cross-errors the defendants insist that the court erred in decreeing partition of any of the premises.

Section 13 of chapter 30 of the Revised Statutes provides that "every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." The estate devised to Louisa Lohr was therefore an estate in fee simple except as limited by the words, "provided she remains my widow, but should she marry, then all the property shall go to my children that are alive, except one-third of the land, which she is to have during her lifetime." Counsel for plaintiff in error has assumed that the word "provided" has the

same meaning in the will as the word "while." In our judgment this is erroneous. "While" is merely an adverb expressing duration. "Provided" is an apt word to express a condition. While this is not its fixed and invariable meaning, it will be so taken unless a different intent appears from the context and an examination of the whole instrument. Rich v. Atwater, 16 Conn. 419; Stanley v. Colt, 5 Wall. 166. The words of the devise are sufficient to pass the fee to the widow, and the proviso merely annexes a condition which converts the fee simple into a conditional or base fee, subject to be terminated by her marriage. Her conveyances of the 160 acres to August and Henry Lohr, and Henry's conveyance to August, therefore vested the fee in the latter, subject, of course, to the conditional limitation over in the event of her marriage.

The question whether a will passes real estate acquired after its execution depends upon the intention of the testator. Unless an intention to dispose of such estate affirmatively appears from the will it will not pass. Woman's Union Missionary Society v. Mead, 131 Ill. 338. Here the testator devised to his wife "all the real estate that I may die seized of." This language shows an intention to devise any property he might acquire after the execution of the will, and we do not regard the words descriptive of the land he then owned as intended to limit the prior devise of all his real estate. The will gave to the widow a qualified fee in all the land of which the testator died seized, subject to be terminated by her marriage. The plaintiff in error has no present estate in any of the land but only an expectancy. No estate will vest in her except in the event of the marriage of Louisa Lohr. Fifer v. Allen, 228 Ill. 507. There can be no partition of an expectancy, and the bill should therefore have been dismissed. * * *

Reversed and remanded, with directions.

DIVISION II

THE EXECUTION, REVOCATION, REVIVAL AND REPUBLICATION OF WILLS

CHAPTER VII.

THE EXECUTION OF WILLS.

Section A. Fraud, Undue Influence, and Mistake.

In Re TYNER'S ESTATE.

97 Minn. 181, 106 N. W. 808. 1906.

ELLIOTT, J. This is an appeal from a judgment of the district court, sustaining the will of John Tyner after the probate court had refused to admit it to probate.

John Tyner died testate, November 10, 1903, at the age of 87, leaving as heirs at law three sons, Richard, Thomas, and John, one daughter, Rebecca O'Leary, the children of two deceased daughters, and his wife Margaret. The will in question was executed July 2, 1891. The property consists of 160 acres of land in Dakota county, Minn., and personal property of about the value of $4,500. Under the will Richard, Thomas, and John receive $2.50 each. To the wife, Margaret, is given "all the rest, residue and remainder of my property, both real or personal, or mixed, of which I may die seized or possessed, to have and to hold for and during the term of her natural life, and to use as she may deem best, and I do hereby authorize my said wife to dispose of any of the personal effects and convert the same into money and to use so much of the money as may be necessary for her personal support."

After the death of the wife, Rebecca O'Leary, the daughter, and Mary A. Bird, a niece, are given $500 each "out of my moneys and credits, if so much remains after the payment of

all claims and expenses of the last sickness of myself and wife." Other small bequests were made, but they are not important as far as this appeal is concerned. After the death of Margaret Tyner, all the land owned by John Tyner is given to Richard and William Varian, the nephews of the wife, Margaret. The result is that Margaret Tyner is given the use of the land and of all the personal property during her life, and at her death the land goes to her nephews, to the entire exclusion of the children of the testator. The contestants, the children of the testator, contend that the will is the result of undue influence exercised by Margaret Tyner, the wife of the testator.

1. The right to dispose of property by will is the creature of positive law, but it is carefully guarded and protected. A person who has testamentary capacity may make such a disposition of his property as conforms to his ideas of justice and propriety. He may be guided by lofty and beneficent motives, or by sordid prejudice and personal dislike. The justice and righteousness of his final dealings with those who are the natural objects of his bounty and toward whom he has assumed solemn duties and obligations are to be determined by the final judge of all human conduct. Subject to very limited statutory restrictions, the power of testamentary disposition is absolute.

But a valid will must be the result of the voluntary act of the testator, and not merely express the will of some other person. The wife, and other possible objects of his bounty, may properly influence his actions; but this influence must not be so great as to destroy his power of will. The words "undue influence" carry with them their own limitation. The influence must not be undue. To constitute undue influence the testator must be so influenced by persuasion, pressure, or fraudulent contrivance that he does not act intelligently or voluntarily and is subject to the will and purpose of another. It may be exerted through threats, fraud, importunity, or the silent, resistless power which the strong often exercise over the weak or infirm. It must be sufficient to destroy this free agency and substitute the will of another for that of the testator. Entreaty, importunity, or persuasion may be employed, as may appeal to the memory of past kindnesses and the calls of the distressed. Mere suggestions or advice addressed to the understanding or judgment of the testator never constitute undue influence;

neither does solicitation, unless the testator is so worn out with importunities that his will gives way. Robinson v. Robinson, 203 Pa. 401, 53 Atl. 253.

The fact that the will is inofficious, harsh, and unjust is not in itself evidence that it was induced by undue influence. Mitchell v. Mitchell, 43 Minn. 73, 44 N. W. 885. Nor is the fact that the beneficiary under the instrument had special opportunities to exert undue influence over the testator. But when there is evidence, independent of any question of inequality in the will, tending to show acts of undue influence over the testator to procure the will on the part of those who appear to have been preferred, the fact that the distribution of property is grossly inequal and unjust may be received to strengthen the evidence of undue influence. * * *

Generally the burden of showing that a will was procured by undue influence rests upon those who assert the fact; but when the contestants have made a prima facie case, by the production of evidence from which the presumption of undue influence arises, the burden is then upon the proponents to show that the instrument is the will of the testator. It is not very material whether we say that in such case the burden shifts, or that the evidence produced, aided by the presumption which arises therefrom, is evidence sufficient to make a prima facie case. * * * What is meant is that a point is reached when the contestant prevails unless the proponent assumes the obligations of going forward with his evidence. * * *

In the light of these general principles we proceed to a review of the evidence. It is not possible to set out all the testimony; but a very brief summary will be sufficient to show that the contestants fulfilled all the requirements necessary to make a prima facie case of undue influence, and that it was not overthrown by the evidence offered by the respondent. John Tyner's first wife died in 1866, and within two months thereafter he married Margaret Varian. When the second wife came into the family, she found four children, all under 18 years of age. Almost from the beginning the family life was unhappy. She evidently took a dislike to the children, and soon began a systematic effort to drive them from the home. In this she was ultimately successful. The children were frequently whipped by the father at her request. They were not allowed the food

which was supplied to the other members of the family. They were deprived of proper and necessary clothing and schooling and seem to have been generally illtreated. One of the boys returned home on two occasions and was refused admission by his step-mother. Another farmed the land for two years, but finally left because of trouble with Margaret. A few years later the father sent for him and he made another attempt to run the farm, with the same result. She disliked them, and was determined that they should not be at home with their father. It clearly appears that the boys were driven from home by the continuous ill treatment of Margaret Tyner. During the last illness of John Tyner his wife would not permit reports of his condition to be sent to his absent children, and she prevented the news of his death reaching them until it was too late for them to attend the funeral. There is no evidence that the children were to blame, and in view of the age and relation of the parties it should not be presumed. John Tyner was an illiterate man, unable to read or write. He seems to have had some natural capacity for acquiring and retaining money, which he concealed about the premises in old tomato cans. The testimony shows that Margaret was much the stronger character, and generally had her way about household and business affairs. She had some education, and her husband, as is usual in such cases, overestimated the importance of a little book learning. He was so deaf that it was necessary for her to be with him when he transacted any business and do most of the talking. He seems to have relied largely upon her for his information and trusted to her judgment. She was persistent, energetic, and resourceful. Like her husband, she was in the habit of drinking, and they frequently went to town and got drunk together.

The property and its final disposition seems to have been continually in her mind, and from the first she determined that the children should never have the land. She told the neighbors that the land had been promised to her brother's children. She kept everlastingly talking to her husband about the worthlessness of the boys, and accused them of being lazy, thieving, and shiftless. Her purpose, it may fairly be assumed, was to so prejudice his mind against them that he would cast them off and leave his property to others of her choosing. She told the neighbors that the children should not have the land. When

the will was made Margaret was with the testator, making suggestions and doing part of the talking. After it was made she expressed her approval of its contents, and from that time until the death of John Tyner she exerted her influence to prevent him from becoming reconciled to the children and changing the will. She said "the will was made the way she wanted it, and was not going to be changed." It is apparent that she earnestly desired to influence her husband in the making of his will, and that she was induced to do this by her dislike of the children and her desire to have the land go to her own relatives. She was also to some extent personally benefited by the will, as she received all the law would give her, and in addition thereto she was given complete control over all the personal property during her life.

But the ultimate question is whether her influence actually induced the will. It is certain that it was exerted for the purpose of controlling the making of the will and the disposition of the property. John Tyner stated to disinterested parties that Margaret would not permit him to leave the land to the children. He told the witness Flannery that he gave the boys nothing because Margaret did not want them to have anything. He also told Mrs. Joego that he was not going to give any of the land to his children, because Margaret "would not allow him to." The same statement was made to Mary Tyner. All of this evidence stands uncontradicted. Margaret was present at the trial, but was not called as a witness. John Tyner's wife and children were the natural beneficiaries of the property, and there is nothing to show that the children were not deserving of his consideration. The attempt to show that they had improperly left home and neglected their father failed completely. There being evidence of this character in the case, the inofficious, harsh, and inequitable character of the will may also be taken into consideration. The Varians, who received the homestead, are not of the blood of the testator, but are the nephews of his wife. As far as the record shows they had never done anything for John Tyner, except farm the land for a time, nor was he under any obligation to them. The evidence thus presents a much stronger case than appeared in Clarity v. Davis, 92 Minn. 60, 99 N. W. 363, where Chief Justice Start, speaking for the court, said: "In view of these admitted facts and

the relation existing between the legatee and the testator, the claim of the appellant that the burden was upon the respondent to show by clear and satisfactory evidence that the testator was mentally competent to make his will and that its execution was not procured by undue influence and fraud is, as it must be, conceded by the respondent."

Judgment reversed, and new trial ordered.

Ambiguitas Latens.

KARSTEN v. KARSTEN.

254 Ill. 480. 1912.

CARTWRIGHT, J., delivered the opinion of the court:

John Karsten died on July 9, 1910, leaving Sofie Karsten, his widow, Mary Spellmeyer, Charles F. Karsten and Annie Knox, his children, and Freda Karsten, Reuben Karsten and Luella Karsten, his grandchildren, minor children of William Karsten, a deceased son. He owned four hundred acres of land in Ford county, a lot and a half in the village of Melvin and some personal property. He left a last will and testament, the material parts of which are as follows:

"First. That I hereby Will unto my Beloved Wife all my Real and Personal Property Sofie Karsten as long as she may live after her Death and the West Half (W. ½) of the North East Quarter (¼) of Section twenty-three (23) Township twenty-five (25) Range Eight (8) East (3) P. M. and the North Half (½) of the North West Quarter (¼) of Section twenty-four (24) Township twenty-five (25) Rainge (8) East of the Third P. M. Shall be sold to Pay all Expenses and to pay to the Hears of My Deceased Son the Sum of one Thousand Dollars Each that is to say Fridie Karsten and Ruben Karsten and Luella Karsten that if they all three Die that the Grant shall fall Back to the Original Heirs.

"Second that it is my Will that My Daughter Mary Spellmeyer and My Son Charles F. Karsten and My Daughter Annie Knox shall be Equally Devided between all three.

"Third: that the One of My Children shall take care of one or either of us shall receive for their recompenc the sum of One Thousand Dollars, ($1000.00)

"Fourth: that it is My Will that My Executor plase a Monument in one year after our demice not to Exceed the sum of Three Hundred Dollars, $300.00.

"Fifth: that any of My Heirs oing the Estate any notes shall be counted in their share."

The widow, Sofie Karsten, died on March 2, 1911, and on May 29, 1911, Charles F. Karsten, as executor of the will, filed in the circuit court of Ford county the original bill in this case against the devisees, legatees and heirs-at-law, including himself, asking the court to construe the will. The court permitted an amendment making the appellants, Charles F. Karsten in his own right and Mary Spellmeyer and Annie Knox, complainants, and the appellees, Charles F. Karsten as executor and the three minor grandchildren and others, defendants. The amended bill alleged that the provision of the second item of the will expressed in the following words, "that is my Will that My Daughter Mary Spellmeyer and My Son Charles F. Karsten and My Daughter annie Knox shall be Equally Devided between all three," was operative as a devise and bequest to the three persons named therein of the residue of the estate, real and personal, after the payment of debts, costs of administration, the cost of the monument and the specific bequests mentioned in the will; that the testator did not own the north half of the north-west quarter of section 24 but did own the south half of said north-west quarter, and owned no other land in said section; that through the inexperience of the scrivener and the want of correct knowledge of the description of the land the word "north" was inserted instead of the word "south"; that the testator intended to dispose of land he owned in section 24, and that the will should be construed by striking out the word "north" and making the same read, "the south half of the north-west quarter." Charles F. Karsten in his capacity as executor was defaulted and a guardian ad litem was appointed for the minor defendants. The guardian demurred specially to the bill, and the court sustained the demurrer as to all of the grounds but one. The complainants elected to stand by their amended bill, and the court entered a decree construing the will and finding that the testator died intestate as to all of his property except the west half of the north-east quarter of section 23, which he owned and which he ordered to

be sold, and that the intestacy included any balance of the fund arising from the sale of that tract of land after paying the expenses of administration arising from any deficiency in the personal property, the bequests to the minor children, $1,000 to the child or children who took care of the testator or his wife, and the cost of the monument. From that decree this appeal was taken.

The important question to be determined is whether the testator by the second item of his will devised and bequeathed the residuary estate, real and personal, to the son and two daughters therein named. Inasmuch as the statute requires wills to be in writing and attested by witnesses, the settled rule is that while surrounding facts and circumstances may be proved to explain a latent ambiguity which is not found upon the face of the instrument itself, extrinsic evidence cannot be admitted to explain a latent ambiguity which appears on the face of the will or to supply its omissions and deficiencies, since that would be to make a will for the testator. Under the statute, that, only, is the will of the testator which is in writing and signed by him, and the statutory provisions would be rendered nugatory and the door opened to all the evils which the law requiring wills to be in writing and attested was designed to prevent, "if, when the written statement failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied or its inaccuracies corrected from extrinsic source." I Jarman on Wills, 4th ed. 409. Extrinsic evidence is a mere aid to construction and is never admissible for the purpose of making a will for the testator, even if it establishes the fact that he intended to make one, if he did not, in fact, do so.

The facts alleged in the bill not appearing on the face of the will are, that the testator owned four hundred acres of land in Ford county and a lot and a half in the village of Melvin; that he was born in Germany, was sixty-seven years old and not versed in such matters as executing wills. Great allowance is to be made for ignorance or want of skill of one who writes a will, and no want of technical formality will prevent the courts from executing the intention of the testator if it can be ascertained from the language employed, however informal it may be; but we are unable to determine the intention of the testator

from his birthplace, age or experience in the making of wills. The fact of ownership of a large amount of land not disposed of by the will is material as an aid to construction, because there is a legal presumption against partial intestacy. There is a strong presumption that a testator did not intend to die intestate as to any of his property, and a gift will be sustained without express or formal words if the intention to make it clearly appears from the will as a whole. But such a gift cannot rest upon conjecture. Connor v. Gardner, 230 Ill. 258. The intention is not one which it may be inferred existed in the mind of the testator but it is the intention expressed in the language of the will, and the rule is inflexible that surrounding circumstances cannot be resorted to for the purpose of importing into a will any intention which is not there expressed. Lomax v. Lomax, 218 Ill. 629. The mere fact that a testator owned property would not justify a court in holding that he disposed of it by will unless an intention to dispose of it is found in the will itself, because that would prevent partial intestacy in practically every case. It is undoubtedly true that after the disposition of a portion of an estate by devises and bequests a provision might be interpreted as a residuary disposition of what remained without the use of the word "residue" or "remainder," or other formal expression, but the will must indicate some subject of the devise or bequest. In this case the testator by the first item had merely directed the sale of one tract of land that he owned and another that he did not own, for the purpose of paying the sum of $1,000 to each of his three grandchildren, with a provision that if they should all die the grant should fall back to the original heirs, which meant the death of all in the lifetime of the testator. Fifer v. Allen, 228 Ill. 507. The grandchildren were living at the death of the testator, so that the provision for the sale of their benefit became effective. The testator, of course, intended by the second item to give something to the three children therein named, but whatever it was, he failed to indicate the subject matter in any way. The second item is devoid of sense or meaning, and it would require the insertion of matter not expressed by the testator to make it a residuary clause devising the balance of the property not previously disposed of, to the three children therein named. The second item is followed by the third,

which provides that the one of the children who should take care of the testator or his wife should receive the sum of $1,000, and the fourth that the executor should erect a monument not exceeding in cost $300. The fifth item provides that if any of the heirs owe the estate any notes the same shall be counted in their share, but that provision would apply just as aptly to a devise of specific property or any portion less than the whole of the residuary estate. The subject of the devise in the second item was not merely uncertain or indefinite but was entirely omitted, and there was nothing mentioned, the court had no power to add to it by inserting in it something that did not appear. Engelthaler v. Engelthaler, 196 Ill. 230.

The testator directed the sale of the tract of land which he owned and the north half of the north-west quarter of section 24, which he did not own, and the proceeds were to be devoted to paying expenses and the sum of $1,000 to each of the three grandchildren. The bill alleged that the word "north" should be stricken out as a false matter of description and the will be held to direct the sale of the south half of the quarter section. The argument against the conclusion of the court is mainly based upon the presumption against partial intestacy, but that presumption is overcome by the fact that the testator did not dispose of all his estate but died intestate as to a part of it. There is no occasion, however, to enter upon the consideration of the many questions raised by counsel respecting the striking out of words of false description, for the reason that the question has become one of no practical importance. It does not appear that the sale of the tract which the testator did own would be insufficient for the payment of the expenses and legacies to be paid out of the proceeds of the sale, and there was no fact alleged showing that it would be conducive to the interests of the complainants that the south half of the quarter section should be sold and the proceeds distributed, rather than it should pass to them and the other heirs-at-law as land. It was not alleged that any one of the children took care of the testator and his wife or became entitled to $1,000, if that sum was to be paid out of the proceeds of the sale of the specific property ordered to be sold, and any surplus would go in exactly the same proportions to the same heirs as if the land itself passed as intestate property. The guardian ad litem,

acting, so far as we can discover, in the interest of the minors who were to receive the legacies, demurred to the bill with respect to the construction sought to be put upon it by the complainants, evidently deeming it for the best interest of the minors that the land should not be sold. As we have held that the complainants were not entitled, under the second item, to any surplus that might remain from a sale and will take their interests as heirs in any intestate estate, we do not see any benefit that would result to them by striking out any part of the description and selling land to divide the proceeds. No question is raised in this court concerning the propriety of Charles F. Karsten being on both sides of the case.

The decree is affirmed.

Section B. Form of the Will.

Where the Signature Should Appear.

ALBRIGHT ET AL. v. NORTH ET AL.

146 Cal. 455, 80 Pac. 700, 106 Am. St. Rep. 5, 1905.

Per Curiam. A document purporting to be the last will and testament of Henry Seaman, deceased, was presented to the superior court, and an application for its probate was denied upon the ground that it had not been properly executed, in that the name of the testator was not subscribed at the end thereof. From the judgment thus entered, the present appeal has been taken.

The instrument was written upon a printed form or blank consisting of four pages folded in the middle, like ordinary legal cap. Upon the upper portion of the first page was a printed heading and introduction, occupying about one-fourth of the page. In the printed form the remainder of that page and the entire second page were left blank. The dispositive parts of the will were written upon the blank portion of the first page and about one-fourth of the blank portion of the second page, and at the close thereof a line was drawn in red ink transversely to the bottom of the second page. At the top of the third page there was printed a form for the appointment of an executor, and a clause revoking all former wills, and immediately after this a testimonium clause, underneath which, and

extending to a little below the middle of the page, was printed an attestation clause. The blanks left for the name of an executor and for the attestation of the will were left unfilled. The remainder of the third page and the first or upper half of the fourth page are blank. The printed form was prepared to be twice folded from the bottom to the top, and across the face of the paper as thus folded, and at the top thereof, were the printed words: "The Last Will and Testament of," under which the scrivener had written, "Henry Seaman." Blank forms for a date and for filing the instrument with the clerk were printed underneath this, the whole occupying the upper half of this outside face of the paper when folded. Underneath this printed matter was written, "Henry Seaman," and underneath his name the word "witness," and underneath that the names, "M. O. Wyatt, J. H. Wright." The remainder of the fourth page was blank.

It was shown at the hearing that the decedent had written his name at that place in intended execution of his will, and that at his request Messrs. Wyatt and Wright had signed their names as witnesses thereto. It was also shown that, with the exception of these signatures, the instrument is in the same condition as it was when the decedent signed his name thereto.

The right to make a testamentary disposition of one's property is purely of statutory creation, and is available only upon a compliance with the requirements of the statute. The formalities which the Legislature has prescribed for the execution of a will are essential to its validity, and cannot be disregarded. The mode so prescribed is the measure for the exercise of the right, and the heir can be deprived of his inheritance only by a compliance with this mode. For the purpose of determining whether a will has been properly executed, the intention of the testator in executing it is entitled to no consideration. For that purpose only the intention of the Legislature, as expressed in the language of the statute, can be considered by the court, and whether the will, as presented, shows a compliance with the statute. Estate of Walker, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104.

Section 1276, Civ. Code, requires every will, other than nuncupative or holographic, to be "subscribed at the end thereof" by the testator, in the presence of two attesting witnesses, each

of whom must, in his presence and at his request, sign his name as a witness "at the end of the will." This section is from the Revised Statutes of New York, adopted by that state in 1830. These provisions are incorporated into the Civil Code prepared for adoption by that state by David Dudley Field, and, in their report of a Civil Code to the Legislature of 1871, the code commissioners of this state refer to this Code as the source of the section. In considering the section the decisions of that state upon the same question are therefore entitled to great consideration. A similar statute was enacted in England in 1837 (St. 1 Vict. c. 26), but the decisions under that statute as to what constitutes the "end" of a will are inconsistent and contradictory. In the earlier cases the statute received a very liberal construction in reference to the amount or extent of blank space that might be left between the termination of the will and the signature of the testator, but afterwards the same judge who gave this construction, as did also the Privy Council in affirming his judgment, stated that he felt it necessary to construe the act more strictly, on the ground that the provision was intended to prevent any addition being made to the will after the deceased had executed it * * * and the statute was construed as requiring the name to be written immediately after the termination of the testamentary provisions, without any space whatever between them. It was in view of these different constructions of the statute that in 1852 Parliament passed an explanatory act (St. 15 Vict. c. 24) known as "Lord St. Leonard's Act," which provided that the will should be valid "if the signature be so placed at or after or following or under or beside or opposite to the end of the will, that it should be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will," and that no such will should be affected by the circumstance that "a blank space shall intervene between the concluding end of the will and the signature," etc.; thus permitting an inquiry into the intention of the testator, contrary to the rule on that subject in this state. The provisions of this act are so directly opposed to section 1276, Civ. Code, that the decisions thereunder are not entitled to any consideration in interpreting the section. * * *

The provision that the will must be subscribed at the end

thereof requires the testator's name to be written at the termination of the testamentary provisions which he makes in the instrument. The "will" at whose end the name is to be subscribed is not the sheet of paper or other material upon which these testamentary provisions are written, but it is the declaration which the testator has written thereon for such testamentary disposition, and the "end thereof" is not the foot or physical end of the sheet of paper upon which the "will" is written, but is the physical termination of the testamentary provisions which constitute the will. "The act of authentication must take place at the termination of the testamentary disposition." McGuire v. Kerr, 2 Bradf. Sur. (N. Y.) 244. "To say that, where the name is, there is the end of the will, is not to observe the statute. That requires that, where the end of the will is, there shall be the name. It is to make a new law to say that, when we find the name, there is the end of the will. The instrument offered is to be scanned to learn where is the end of it, as a completed whole, and at the end thus found must the name of the testator be subscribed." * * *

The requirement that the name shall be subscribed "at" the end of the will is not satisfied by having that name written at any place "after" the termination of the written matter, irrespective of the relation which such place bears to the concluding portion of the will. This provision does not, however, of necessity, require that it shall be in immediate juxtaposition with the concluding words of the instrument, but that it shall be so near thereto as to afford a reasonable inference that the testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes. It must appear upon the face of the instrument not only that he intended to place it at the end of his testamentary provisions, but that he has in fact placed it in such proximity thereto as to constitute a substantial compliance with this requirement of the statute. While a slight space, such as a single line, or even more, might be left blank between the written matter and the name, without impairing the validity of the will, yet to leave blank an entire page between the two would indicate a disregard of the requirements of the statute, whether resulting from ignorance or intention, which would prevent its admission to probate. See Soward v. Soward, 1 Duv. (Ky.) 126.

Appellants have cited the case of Gilman's Will, 38 Barb. (N. Y.) 364, in which the written matter of the will terminated four lines above the bottom of the page where the testator signed his name, and in which the court said: "An instrument is signed at the end when nothing intervenes between the instrument and the subscription. The place named in the statute is the end. The end of an instrument in writing commences and continues until something else or some other writing occurs." This language may have been appropriate to the will then before the court, but, as a construction to be given to the statute, it does not meet with our approval, and is, moreover, inconsistent with the construction given in the above cases cited from the Court of Appeals of that state. Particularly do we dissent from the definition of "end" as given in the last sentence of the quotation.

The formalities which the Legislature has prescribed for the execution of wills are to provide against false and fraudulent wills, and to afford means of determining their authenticity. A very evident purpose of requiring the testator's name to be subscribed at the end of the will is not only that it may thereby appear upon the face of the instrument that the testamentary purpose which is expressed therein is a completed act, but also to prevent any opportunity for fraudulent or other interpolations between the written matter and the signature. * * * "The statutory provision requiring the subscription of the name to be at the end is a wholesome one, and was adopted to remedy real or threatened evils. It should not be frittered away by exceptions" * * * "or by judicial construction" * * * "or defeated by lax interpretation." * * * "The purpose of the law which requires the subscription to be at the end of the will is to prevent fraudulent additions to a will before or after its execution, and the statute should be so construed as to accomplish this purpose." Younger v. Duffie, 94 N. Y. 535, 46 Am. Rep. 156.

It is immaterial that there is no charge of fraud in any particular case. A failure to comply with the formalities required by a statute enacted for the prevention of fraud is not excused by showing that in the particular case under consideration there was no fraud. The statute in question was enacted to protect the wills of the dead from alteration. If opportunity

for such alteration is permitted, the fraud may be so deftly accomplished as to prevent its discovery, and for this reason the construction to be given the statute should be such as will control the execution of all wills. "The legislative intent was doubtless to guard against fraud and uncertainty in the testamentary disposition of property by prescribing fixed and certain rules by which to determine the validity of all instruments purporting to be wills of deceased persons." * * *

It is true, as suggested by the appellants, that there is the same opportunity for fraudulent interpolations in the will if the testator should leave sufficient space therefor between the several items of his will. But it is a sufficient answer to this suggestion that the form in which the provisions of a will are drafted is no part of its execution, and that the Legislature has not attempted to prescribe the form in which the testator shall express his testamentary purpose, or in which the will shall be drafted, but only the form in which it is to be "executed and attested." * * * In Estate of Blake, 136 Cal. 306, 68 Pac. 827, 89 Am. St. Rep. 135, the testator left a blank space of several lines between the items in which he disposed of his property and the items appointing an executor and revoking his former will. These last items were, however, testamentary provisions (Sisters of Charity v. Kelly, 67 N. Y. 415); and, as they constituted a part of his will, the end thereof was not reached until they had been written upon the paper, and, as his name was subscribed to the testamentary clause, which immediately followed these items, it was held that it was subscribed at the end of the will.

A question similar to the one involved herein was presented in Soward v. Soward, 1 Duv. 126. The statute of Kentucky required the witnesses, as well as the testator, to "subscribe" the will with their names, which the courts of that state construed to mean that they should write their names at the close of the will. In the will then before the court the witnesses wrote their names, as did the testator in the present case, on the outside or fourth page of the sheet after it had been folded, and across it as so folded. The court held that this was not a compliance with the statute, saying: "So far from subscribing their names to the will, it may be said with much more propriety and accuracy of speech that they merely indorsed the

paper enveloping and inclosing the will, without any accompanying writing or memorandum to indicate the purpose of the indorsement, or showing any connection whatever between the indorsement and the will." In Roy v. Roy's Ex'r., 16 Gratt. (Va.) 418, 84 Am. Dec. 696, the sheet of paper upon which the will was written was folded in the form of a letter, and the words, "David M. Roy's Will," were indorsed upon the back in the handwriting of the deceased at about the middle of the third page when the paper was unfolded. His name was not signed at the end of the writing. The court held that it was not entitled to probate, saying: "It is an unusual mode of signing or authenticating a paper as a concluded act by indorsing the name of the person executing it on the back. Such indorsement is usually made as a label or mark to distinguish it from other papers, and probably it never occurred to the deceased that it was to have any other function in this case." The same rule was followed in Warwick v. Warwick, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775; Patterson v. Ransom, 55 Ind. 402.

Whether the deceased intended to execute his will in conformity with the requirements of the statute cannot be shown by parol or extrinsic evidence. Parol evidence cannot be admitted to show that the testator intended the space signed by him to be the end of the will, if, upon an inspection of the instrument, it appears that it is not in fact at the end. Evidence will not be received for the purpose of showing that he intended to comply with the requirements of the statute if it appears upon the face of the instrument that he had not in fact so complied. It must appear upon the face of the will itself that its physical execution is in accordance with these requirements. * * *

Under these considerations, it must be held that the testator did not comply with the requirements of the statute in the execution of his will, and the judgment of the superior court is therefore affirmed. * * *

ANGELLOTTI, J.: I concur. I am of the opinion that the true test by which to determine whether the requirement of our law that the testator shall subscribe his name at the end of the will has been complied with, and the will, therefore, in that respect executed, is as stated in the concurring opinion of the chief justice.

Reference to Another but Unattested Document.

BRYAN'S APPEAL.

77 Conn. 240, 58 Alt. 748, 68 L. R. A. 353, 107 Am. St. Rep. 34.
1904.

TORRANCE, C. J. The court of probate for the district of New Haven approved and admitted to probate a certain writing as the last will of Philo S. Bennett, deceased. That will contained, as its 12th clause, the following: "I give and bequeath unto my wife, Grace Imogene Bennett, the sum of fifty thousand dollars ($50,000), in trust, however, for the purposes set forth in a sealed letter which will be found with this will." At the time this will was offered for probate there were also offered for probate as a part of it, under the 12th clause of the will, two writings hereinafter referred to as Exhibits B and C.

The court of probate refused to approve or admit to probate as parts of said will each and both of these exhibits; and from that part of its decree an appeal was taken to the superior court, by William J. Bryan individually, and as trustee under the will as he claims it to be. The will admitted to probate is in the record called Exhibit A; while Exhibits B and C are letters which, as the appellant claims, constitute a part of the will. The will was executed in New York, and is dated the 22d day of May, 1900.

Exhibit B is a letter from the testator to his wife, of which the following is a copy:

"New York, 5/22/1900.

"My Dear Wife: In my will just executed I have bequeathed to you seventy-five thousand dollars (75,000) and the Bridgeport houses, and have in addition to this made you the residuary legatee of a sum which will amount to twenty-five thousand more. This will give you a larger income than you can spend while you live, and will enable you to make bountiful provision for those you desire to remember in your will. In my will you will find the following provisions:

"I give and bequeath unto my wife, Grace Imogene Bennett, the sum of fifty thousand dollars (50,000), in trust, however, for the purposes set forth in a sealed letter which will be found with this will.

"It is my desire that fifty thousand dollars conveyed to you in trust by this provision shall be by you paid to William Jennings Bryan, of Lincoln, Neb., or to his heirs if I survive him. I am earnestly devoted to the political principles which Mr. Bryan advocates, and believe the welfare of the nation depends upon the triumph of those principles. As I am not as able as he to defend those principles with tongue and pen, and as his political work prevents the application of his time and talents to money making, I consider it a duty, as I find it a pleasure, to make this provision for his financial aid, so that he may be more free to devote himself to his chosen field of labor. If for any reason he is unwilling to receive this sum for himself, it is my will that he shall distribute the said sum of fifty thousand dollars according to his judgment among educational and charitable institutions. I have sent a duplicate of this letter to Mr. Bryan, and it is my desire that no one excepting you and Mr. Bryan himself shall know of this letter and bequest. For this reason I place this letter in a sealed envelope, and direct that it shall be opened only by you, and read by you alone. With love and kisses, P. S. Bennett."

Exhibit C was a typewritten duplicate of Exhibit B, except that the words "with love and kisses, P. S. Bennett," at the end of Exhibit B, were not contained in Exhibit C, nor was Exhibit C signed by the testator.

Respecting these exhibits the appellant in the Superior Court offered evidence tending to prove the following facts: that about a week or ten days before the date of the will, at the city of Lincoln, Nebraska, the testator, and Mr. Bryan and his wife, prepared a blank draft form of the will, which was subsequently filled out and executed, and that Exhibit C was then also prepared as a blank draft form from which Exhibit B was to be, and was subsequently, drawn; that Exhibit B was in the handwriting of the testator, and was by him placed in a sealed envelope bearing the following indorsement in his handwriting: "Mrs. P. S. Bennett. To be read only by Mrs. Bennett, and by her alone, after my death. P. S. Bennett. (Seal.)"; that the testator, on the day after the date of the will, placed said will and said envelope containing Exhibit B in his box in a vault in the Wool Exchange Building in New York City where they remained as he put them until after his death, the will being

"separate from said letter and said sealed envelope"; and that Exhibit C, from the time it was drawn up, remained in Bennett's custody till his death, and was found soon after that event among his private papers, in an envelope subscribed in Bennett's handwriting as follows: "Copy of letter in Safe Deposit Company vault, Wool Exchange."

The appellant then offered Exhibit C in evidence as part of the will, claiming that it was the original and equivalent of the paper Exhibit B, "and that it was substantially the sealed letter referred to in paragraph 12 of the will." The court excluded the evidence. The appellant thereupon offered in evidence, as part of the will, the letter Exhibit B, and the court excluded it. The appellant also offered parol evidence tending to prove that Exhibit B was the instrument to which reference was made in clause 12 of the will, but the court excluded such evidence. Subsequently the jury, under the direction of the court, rendered a verdict to the effect that Exhibits B and C "are not either separately or together a part of the last will of said Philo S. Bennett, deceased"; and judgment followed in accordance with the verdict.

From the opinion of the trial court, which is made part of the record, the rulings of the court seem to have been based upon several distinct grounds, which may be briefly indicated: (1) Apparently upon the ground that the doctrine of incorporation by reference does not prevail as to wills, under our statute relating to their making and execution; (2), that even if that doctrine prevails here, no paper in the present will is by reference made a part of it, according to the rules universally applied in jurisdictions where the above doctrine prevails; and (3) that the letter, Exhibit B, shows on its face an intent on the part of the testator that it should not constitute a part of his will.

As we think the rulings of the court below can be vindicated upon the second of the grounds above mentioned, it will be unnecessary to consider the other two grounds; but in thus resisting our decision upon the second ground we do not mean to intimate that it could or could not be made to rest upon the first or third.

Before considering the second ground a word or two regarding the first ground may not be out of place. Under the rule prevailing in England, an unattested document may, by refer-

ence in a will, under certain conditions and limitations, become by such reference incorporated in the will as a part of it; and that too whether the document referred to is or is not a depositive one; and one of the leading cases upon this subject is that of Allen v. Maddock, 11 Moore's P. C. C. 427, decided in 1858. This is known as the doctrine of incorporation by reference; and the principle upon which it rests does not differ essentially from that which is applied in incorporating unsigned writings in a signed instrument so as to constitute a memorandum in writing under the Statute of Frauds. The English rule appears to prevail in many of our sister States; but the question whether it prevails in this State, and if so, with what limitations and under what conditions, was left undetermined in Phelps v. Robbins, 40 Conn. 250, and has never been passed upon since. In the present case we find it unnecessary to decide those questions; but for the purposes of the argument we shall assume, without deciding, that the doctrine of incorporation by reference in a will prevails here.

Two of the conditions, without the existence of which the English rule will not be applied, are concisely, but we think correctly, stated in Phelps v. Robbins, supra (page 272), as follows: "First, the paper must be in existence at the time of the execution of the will; and, secondly, the description must not be so vague as to be incapable of being applied to any instrument in particular, but must describe the instrument intended in clear and definite terms." In a California case upon this subject this language is used: "But before such an extrinsic document may be so incorporated, the description of it in the will itself must be so clear, explicit and unambiguous as to leave its identity free from doubt." Estate of Young, 123 Cal. 337, 342, 55 Pac. 1011.

In an important and well considered English case, decided in 1902, the court uses this language upon this subject: "But it is clear that, in order that the informal document should be incorporated in the validly executed document, the latter must refer to the former as a writing existing—that is, at the time of the execution—in such terms that it may be ascertained. * * * The document which it is sought to incorporate must be existing at the time of the execution of the document into which it is to be incorporated, and there must be a reference in

the properly executed document to the informal document as an existing one, and not as a future document." In the Goods of Smart, L. R. (1902) P. D. 238, 240.

Tested by the rules as thus laid down in the cases above cited, and in numerous others that might be cited, the will in the present case fails to comply with the required conditions under which incorporation by reference can take place in the case of wills. In clause 12 of the will in question here a large sum of money is given to Mrs. Bennett "in trust, however, for the purposes set forth in a sealed letter which will be found with this will." There is not in the language quoted, nor anywhere else in the will, any clear, explicit, unambiguous reference to any specific document as one existing and known to the testator at the time his will was executed. Any sealed letter, or any number of them, setting forth the purposes of the trust, made by anybody, at any time after the will was executed, and "found with the will," would each fully and accurately answer the reference; and if we assume that the reference calls for a letter from the testator, it is answered by such a letter or letters made at any time after the will was drawn. The reference is "so vague as to be incapable of being applied to any instrument in particular" as a document existing at the time of the execution of the will; "the vice is that no particular paper is referred to." Phelps v. Robbins, 40 Conn. 250, 273. Such a reference as is made in the present will is, in fact as well as in law, no reference at all; certainly it is not such a reference as the rules under the doctrine of incorporation by reference require in the case of wills.

A reference so defective as the one here in question cannot be helped out by what is called parol evidence; for to allow such evidence to be used for such purpose would be practically to nullify the wise provisions of the law relating to the making and execution of wills. We know of no case, and in the able and helpful briefs filed in this case, have been referred to none, where a reference like the one here in question has been held to incorporate into the will some extrinsic document.

Assuming then, without deciding, that the doctrine of incorporation prevails in this state, as claimed by the appellant, we are still of the opinion that the rulings of which he complains were correct.

Who Takes a Beneficial Interest?

SEARS v. DILLINGHAM.

12 Mass. 358. 1815.

This was an appeal from a decree of the Judge of Probate of the County of Barnstable, approving and allowing the last will and testament of Thomas Snow, late of Harwich in said county, deceased.

The reason assigned for the appeal, pursuant to the Statute, was that the said testator was not, at the time of executing the supposed will, of sound and disposing mind and memory. All the requisites of the law having been complied with on the part of the appellant, and the appeal having been entered October Term, 1813, at Barnstable, an issue was directed by the court and joined by the parties, to try by jury the sanity of the testator; but the original will not being then produced in court, the cause was continued to the next term, October, 1814, when it proceeded to trial.

The said Dillingham was a subscribing witness to the will, and with Thomas Snow, jun., appointed executor thereof.

Before the trial came on, doubts having been suggested of Dillingham's competency to testify on the trial, although he had no bequest or devise to him in the will, he moved for leave to surrender and resign his appointment and trust of executor to said will.

But it was determined by the court, that having accepted the trust, and given bonds faithfully to perform it, he could not afterwards be permitted to renounce.

At the trial, the said Dillingham was offered on the part of the executors and devisees, as a witness to prove the execution of the will and the sanity of the testator; but on motion of the appellant he was rejected as incompetent, on the ground of his being a party to the process liable to the payment of costs, if the decree of the judge of probate should be reversed.

Upon the testimony of the two other subscribing witnesses, and much other evidence, a verdict was returned upon the issue, that the said testator was of sound and disposing mind and memory at the time of executing the said will.

An objection was then taken by the counsel for the appellant, that the will was not authenticated pursuant to the Statute of 1783, c. 24, Sec. 2, which requires the attestation of three credible witnesses.

The cause, being continued nisi for the consideration of this objection, was argued at this term by Whitman for the appellant, and Thomas for the respondents. In support of the objection it was said that Dillingham, not being a competent witness at the trial, could not be a credible witness to attest the will, the object of the Statute being to require such subscribing witnesses, as could testify at the time of the probate of the will, and afterwards, if necessary, upon appeal to this court.

At the following September Term in Berkshire, the opinion of the court was delivered by

PARKER, C. J. The first question to be decided in this case is, whether Dillingham was rightly rejected as a witness at the trial. For if he ought then to have been admitted, it is obvious that the other objection would be superseded.

The court, which made that decision, was competent to make it definitively, but as there was no opportunity to consult books at the place where the trial was had, it is proper to re-examine the question, so far as may be necessary to settle the point now immediately before us. And we are satisfied that the decision was right in principle, as well as conformable to the practice in this State on the rules of evidence.

It seems that by the common law an executor, who is not residuary legatee, and has no beneficial interests in the estate, may be a witness, to prove the execution of the will and the sanity of the testator; being considered a mere trustee and nominal party, having no real interest in the contest. So likewise a guardian in socage, or a devisee in trust for other persons, may be a witness in support of the will. But it is held that a guardian of record cannot be a witness in favor of his ward: and the reason given is, that he is liable for the costs of the suit, if it should be determined against the ward.

By parity of reason, an executor in this State, who by Statute is liable to costs upon an appeal, is not competent to testify upon a trial for he is not merely a nominal party, but is directly and personally interested in the event of the suit. The

interest may be slight; but it may also be important, as the costs in the case of a will, contested on the ground of the insanity of the testator, are usually not inconsiderable. But this rule has been invariably adhered to in the courts of this State, there being no instance of an executor, administrator, or guardian being admitted to testify, to support actions in favor of the estates they represent: their being parties, and liable eventually to costs, having been always deemed a sufficient objection.

The decision of the court, therefore, against the admission of Dillingham as a witness, was right: and this opens the question intended to be saved for consideration,—whether, as one of the subscribing witnesses was incompetent at the time of the trial, the will was attested by three credible witnesses, pursuant to our Statute, which prescribes the manner of devising lands, tenements and hereditaments.

The construction given to the term credible, as used in the Statute, by this court in the case of Armory v. Fellowes, 5 Mass. Rep. 229, is somewhat different from that which was adopted by Lord Mansfield in the celebrated case of Windham v. Chetwynd, 1 Bur. 414, in discussing the effect of the same word in the English Statute of Frauds and Perjuries. The meaning of the Statute, according to our decision, is that the will shall be attested by three witnesses who are competent to testify; and this competency must exist at the time of the subscription, and not be acquired by act ex post facto; as was settled in England in the case of Anstey v. Dowsing, 2 Str. 1253.

It must necessarily follow from the rule, that a subsequent incompetency will not affect the formal execution of the will. Otherwise the commission of a crime, which renders infamous, —or the succession to an estate under a devise, would disable a witness, who was free from any taint of crime or interest at the time of subscribing: a doctrine, which would greatly embarrass the practice of disposing of estates by will, and produce constant uncertainty in the minds of testators, whether their property would be appropriated according to their wishes.

Incompetency to give testimony arises only (except that in some instances a witness is excluded on the ground of policy) from interest and infamy; both of which may arise long after the execution of a will, and frequently without the knowledge

or after the death of the testator. In such cases, proof of the handwriting of the witnesses, who were competent at the time of the attestation, and who cannot be sworn at the trial, or of their actual signing in the presence of the testator, by some witness who remains competent, must be resorted to; or many wills, against which no objection would lie at the time of their execution, would be defeated.

Cases may arise when none of the attesting witnesses can be examined: as if they should all be dead, or should become infamous after the attestation, or should have gone into foreign parts beyond the authority of the State, or the power of the persons interested to obtain depositions. In such cases, there seems to be no reason why the rules of law, which admit of evidence of an inferior character in relation to deeds and other instruments, should not be applicable to a will as to a deed or bond; provided the formalities required by the Statute appear to have been observed.

If then Dillingham was a competent witness at the time he attested the will, there can be now no legal objection to it because of his subsequent incompetency. He appears to derive no interest whatever under the will, not being residuary legatee, or having any devise or bequest in it. He is merely named executor, with another person who is residuary legatee. He could not, even by accepting the trust, acquire any interest; although he might subject himself to some liability, which would render him incompetent afterwards to testify. But this at the time was contingent, and depending altogether upon his assent. Had he died before the testator, the will might have been proved and committed to the other executor to administer alone; or had he renounced the trust, the same disposition would have been made. No person could have been more free from interest, than he was at the time of attestation. He might not have known at the time of signing, that he was named executor in the will. For the witness need not know the contents of the will which he attests: and even the testator might not have known that the person he had named as executor was called as a witness; it not being necessary that he should see the witness face to face.

It was argued, however, that no will can be proved, unless all the subscribing witnesses, who are alive and within the control

of the court, are produced to testify. This, as a general rule, is undoubtedly well settled both here and in England. But there are obvious exceptions, as necessary to be regarded as the rule itself. The case of witnesses having become infamous instantly occurs, as one of the exceptions. They may be alive, and within the control of the court, and yet their testimony cannot be had, and the will may be proved without it. The same reason is applicable to witnesses, who have become interested without the consent of those who claim under the will.

If it be said that such persons may be produced, and the heir may waive his objections to them, and avail himself of their testimony; the same may be said of an executor: and indeed an example is furnished in the present case. It was only at the instance of the heir that Dillingham was rejected, he being in court at the trial and offered as a witness.

We are all of opinion that this will was duly executed according to the Statute: and as the verdict has disaffirmed the reason of appeal, the decree of the judge of probate must be affirmed, with costs for the respondents.

What Is Attestation?

In Re CLAFLIN'S WILL.

75 Vt. 19, 52 Alt. 1053, 58 L. R. A. 261. 1902.

ROWELL, C. J. * * * A more important question arises on the charge where it says that the attesting witnesses must have been informed and have known that it was Claflin's will that they were then and there asked to witness and attest; that, if he concealed from them the fact that it was his will, they did not attest his will; that it was necessary when they signed the will as witnesses that they should know they were signing as witnesses to his will; that they must have been informed of that in some way, and have understood it when they signed.

It appears that the will, including the attestation clause, was written and signed by the testator; that he superintended its execution, and that the attesting witnesses subscribed it at his

request and in his presence; but whether in the presence of one another was the important question.

Under statutes like ours, which provide that wills must be "attested and subscribed by three or more credible witnesses in the presence of the testator and of each other," it is very generally held in this country that the witnesses need not know that the instrument they were attesting is a will, because such statutes are construed not to require it; and it is a question of construction, and nothing more.

The English Statute of Frauds (29 Car. II, c. 3, Sec. 5), before its modification by 1 Vict. c. 26, Sec. 9, required wills of lands and tenements to be "attested and subscribed" in the presence of the testator by three or four credible witnesses; and it was always held in England under that statute that the witnesses need not know that the instrument was a will.

In White v. Trustees of the British Museum, 6 Bing. 310, only one of the witnesses knew the nature of the instrument; and it was argued that, if such a subscription of their names satisfied the statute, the word "attested" would have no force whatever, and might as well have been omitted. But the court said the question was whether there was an acknowledgment in fact by the testator to the subscribing witnesses, though there was none in words, that the instrument was his will; for if, it said, by what the testator did, he must, in common understanding and reasonable construction, be taken to have acknowledged the instrument to be his will, the attestation thereof must be considered as complete within the principle and authority of Ellis v. Smith, 1 Ves. Jr. 11, decided in 1754. And it appearing that the testator knew the instrument to be his will, as it was written and signed by him; that he produced it to the three persons, and asked them to sign it, intending they should sign it as witnesses; that they subscribed their names thereto in his presence, and returned the same identical paper to him,—it was held that he acknowledged in fact to the witnesses, though not in words, that the instrument was his will, and that its execution was good under the statute, for, the court said, whatever might have been the doubt as to the true construction of the statute, the law was then fully settled that the testator need not sign his name in the presence of the witnesses, but that a bare acknowledgment of his handwriting is a sufficient signature to

make their attestation and subscription good within the statute, though such acknowledgment conveys no intimation whatever, nor means of knowledge, either of the nature of the instrument or the testator's object in signing it; and that the facts of that case placed the testator and the witnesses in the same relation as though an oral acknowledgment of his signature had been made.

The same thing is held in Wright v. Wright, 7 Bing. 457. In Trimmer v. Jackson, 4 Burn. Ecc. Law (3d Ed.) 102, a will was established where the testator purposely misled the witnesses into supposing that it was a deed.

In Massachusetts they hold as they do in England, under a statute like ours in this respect. Thus, in Osborn v. Cook, 11 Cush. 532, 59 Am. Dec. 155, the testator signed the instrument in the presence of two of the witnesses, and pointed out his signature to the third witness, and each of the witnesses signed the instrument as a witness in the presence of the testator and at his request; but the testator did not disclose to any of the witnesses that it was his will, nor did any of them know or suspect the nature of the instrument, and yet it was held well executed. The court said that calling on the witnesses to attest his execution of an instrument, the character and contents of which he well knew was, in effect, a declaration that the instrument he had signed, and his signature to which he desired them to attest, was his act, though the character of the instrument was not disclosed to them; that it was as if the testator had said: "This instrument is my act. It expresses my wish and purpose, and, though I do not tell you what it is, I desire you to attest that it is my act, and that I have executed and recognized it as such in your presence," that the legislature had prescribed certain solemnities to be observed in the execution of a will that it may be seen that it is the free, conscious, intelligent act of the maker, but that it had not prescribed that he should publish to the world nor to the witnesses what is in the will, nor even that it is a will.

Connecticut holds the same way, where the statute requires a will to be in writing, subscribed by the testator, and attested by three witnesses, all of them subscribing in his presence and in the presence of each other. Appeal of Canada, 47 Conn. 450. It is there said that the primary reason for requiring the pres-

ence of the witness is that he should be able to say that the testator put his name upon the identical piece of paper upon which he put his own; that the witness identifies the paper by the conjunction of the two signatures, not by the character of its contents. Allen v. Griffin, 69 Wis. 529, 35 N. W. 21, is to the same effect.

In Re Hulse's Will, 52 Iowa 662, 3 N. W. 734, the same is held. There the statute requires a will to be witnessed by two competent witnesses. The court said that to witness means "to see the execution of an instrument, and to subscribe it for the purpose of establishing its authenticity," and referred to the English Statute of Frauds as containing a similar provision, and said it had been construed as not requiring publication in the sense of acquainting the witnesses with the nature of the instrument.

In Watson v. Pipes, 32 Miss. 451, the same is held under a statute taken from 29 Car. II. The court said that such seemed to be the holding in all the states in which the provisions of the English statute in regard to wills have been adopted; that the rule is based upon the plain and obvious construction of the statute, which it did not hesitate to adopt.

The Alabama Code requires wills to be "attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator." The predecessor of this statute was borrowed from 29 Car. II, c. 3, Sec. 5. In Barnewall v. Murrell, 108 Ala. 366, 18 South. 831, the court said that, as the statute did not require the testator to inform the attesting witnesses that the instrument was his will, it was immaterial to the due execution of the will in that case whether the testatrix made any declaration to the attesting witnesses, or gave them any notice or information, that the instrument was her will.

In Schouler, Wills (3d ed.), Sec. 326, it is said to be the long-established doctrine, both of England and the United States, that, independently of an express statute requiring publication, a will may be duly executed without any formal announcement by the testator of a testamentary purpose, and without anything being said by him to show the nature of the instrument the witnesses are called upon to subscribe; that the maker's signature animo testandi, and his proper acknowledgment, showing that he has put his name bona fide upon the paper that

he desires witnessed, when he has not signed in their presence, renders the execution valid in general, without any other or more formal execution; and that the signature of the witnesses being duly affixed, the act of execution becomes complete.

In Missouri, under a statute that is almost an exact transcript of 29 Car. II, c. 3, Sec. 5, they hold that there must be some declaration by the testator that the paper is his will; but that it need not be verbal,—that an act or a sign is enough; but that the witnesses must know it is the will of the testator, and witness it at his request. Odenwaelder v. Schoor, 8 Mo. App. 458. In support of this construction of the statute, Mundy v. Mundy, 15 N. J. Eq. 290, is referred to. But that case was decided under a statute that expressly required that the instrument should be "declared to be" the last will and testament of the testator; so no authority for the holding.

The contestants rely much upon Swift v. Wiley, 1 B. Mon. (Ky.) 114, where it is said that to attest the publication of a paper as a will, and to subscribe thereto the names of the witnesses, are very different things, and required for different ends; that attestation is an act of the mind, subscription an act of the hand; that to attest a will is to know that it is published as such, but to subscribe it is only to write on the paper the names of the witnesses for the sole purpose of identification. But this case is of little worth, for Flood v. Pragoff, 79 Ky. 607, expressly decides that it is not necessary that the witnesses should know the nature of the instrument, and says that the question never before arose in that state; and it hardly could have arisen in Swift v. Wiley, for there was a publication there by the testator, at which the witnesses were present. It is said in Flood v. Pragoff that the Legislature had prescribed such formalities for the execution of wills as it thought proper, and that the court ought not to add to them by construction, especially when the efficacy of the constructive requirement depended solely upon the memory of the subscribing witnesses.

Illinois and Wisconsin repudiate the idea that there is any difference between attesting and subscribing a will. Drury v. Connell, 177 Ill. 43, 52 N. E. 368; Sloan v. Sloan, 184 Ill. 579, 56 N. E. 952; Skinner v. Society, 92 Wis. 209, 65 N. W. 1037.

Dr. Lushington said in Bryan v. White, 2 Rob. Ecc. 315, that he felt no difficulty in answering the question, what is the

meaning of "shall attest"? that attest means that the person shall be present and see what passes, and shall, when required, bear witness to the facts. Lord Chancellor Selborne said in Seal v. Claridge (1881), 50 Law J. 316, that: "Surely the very words 'ad testari' imply the presence of a witness standing by, who is not a party to the deed to be witnessed." Other English cases say that to attest an instrument is not merely to subscribe one's name to it as having been present at its execution, but includes also, essentially, the presence in fact at its execution of some disinterested person capable of giving evidence of what took place. Roberts v. Phillips (1855) 4 El. & Bl. 450; Ford v. Kettle (1882), 9 Q. B. Div. 139. Dr. Lushington somewhere illustrates that as a notary, by his attestation of protest, bears witness, not to the statements in the protest, but to the fact of making those statements, so the witnesses to a will bear witness to all the statute requires attesting witnesses to attest, namely, that the signature was made or acknowledged in their presence.

Judge Redfield, both in his work and his cases on Wills, strenuously contends that the witnesses must know the nature of the instrument; otherwise, he asks, what becomes of all that is said about the great solemnity the law attaches to the formal execution of wills, and how are the witnesses charged with the duty of seeing that the testator is of sound mind before they consent to attest the instrument, which, it is sometimes said, commits them to having attested that fact as well as the formal signature of the testator?

As to the "solemnity," the formal execution of wills being mere matter of statutory requirement, whatever has been said about it dehors the statute goes for nothing. As to the witnesses being charged with the duty of seeing that the testator is of sound mind, the statute does not thus charge them, unless by the word "attested"; and, if that word charges that duty, it must, it would seem, charge the further duty of seeing that he is of full age, for that is as essential under our statute as a sound mind. But the word "attested" does not charge the duty claimed, as is shown by Thornton's Ex'rs v. Thornton's Heirs, above cited. There it was contended that the weight to be given to the testimony of an attesting witness to a will is a matter of law, and that, therefore, the trial court was bound to charge, as

requested, that such testimony is "entitled to much consideration on the question of capacity." But this court said that the law gives no weight to the testimony of such a witness beyond what it would be entitled to under the conditions that usually govern the value of testimony; that the prominence given to such testimony in opinions where both law and fact are discussed, arises from the witness' acknowledged opportunity for observation at the precise time in question, and from the probability of his having used the opportunity on account of his participation in the transaction; that it is because of his opportunity, not because he wrote his name on the instrument, that his testimony is usually listened to with attention; but that the law attaches no fictitious official weight to the testimony, so as to pass it for more than it is worth, but that its value is to be determined by the rules applicable to other testimony.

In Dean v. Dean's Heirs, 27 Vt. 746, it is said that attesting a will by the witnesses is an attestation of its publication; that a formal publication is not necessary; that writing and signing a will is sufficient publication; indeed, that any act of the testator's by which he designates that he means to give effect to the paper as his will, is a publication of the will itself. Nothing in this, except the words "as his will," indicates that the publication must be such as to inform the witnesses of the testamentary character of the instrument. And these evidently do not mean that, for it had just been said that writing and signing the will was a sufficient publication, and that suggests no such idea. They mean no more than is said in Roberts v. Welch, 46 Vt. 164, that a declaration by the testator to the witnesses that it is his will or his instrument is enough. Otherwise the court was running counter to the established construction of 29 Car. II, concerning which the court had a few years before said in Adams v. Field, 21 Vt. 266, that "when our Statute of Wills was enacted that statute of 29 Car. II had received a long-fixed and well-known construction; and when we adopt an English statute we take it with the construction that it has received, on the ground that this was the implied intention of the Legislature."

But it is proper to remark in this connection that what is said in Dean v. Dean's Heirs is entirely obiter, as the only question was whether the testimony warranted the finding that the

will was executed by the testator in the presence of the witnesses, and subscribed by them in his presence and in the presence of each other.

In Roberts v. Welch, 46 Vt. 164, one of the witnesses did not know that the testator had signed the paper at all, nor what the paper was, nor for what purpose he himself was signing it. The court said that, although it was not necessary for the testator to sign in the presence of the witnesses, but that a declaration to the witnesses that it was his will or his instrument would be enough, yet that the witnesses must know that by affixing their names to the instrument they were attesting its execution by the testator; that a person, to become an attesting witness, must be aware of the character of the act he is called upon to perform, and must subscribe his name *animo testandi*. As nothing is said about the fact that the witness did not know the character of the instrument, it is manifest that the court did not regard it essential that he should know it, but only that he should know the character of his own act, and to that end should know that the testator had signed the paper. This gives force to the word "attested" in the statute, and makes it more than "subscribed"; makes it a mental act, but applies it in essentiality only to the execution of the instrument, not to a knowledge of its character.

But it is claimed that in this very case, when it was here before (73 Vt. 129, 50 Atl. 815, 87 Am. St. Rep. 693), we said the witnesses must know the character of the instrument. The language most relied upon in support of the claim is this: "Nor was it necessary to show by the attesting witnesses that at the time they signed they knew they were signing the testator's will. This fact, though necessary (Roberts v. Welch, 46 Vt. 164), may be shown by other witnesses, or it may be inferred from the circumstances." This language, when taken in connection with the case to which it refers and the context, does not mean, we think, what is claimed for it. The case referred to, as we have seen, does not require that the witnesses must know that the instrument is the testator's will, but only that it is his instrument, and that by affixing their names to it they are attesting its execution as such by the testator.

And when we look at the context we see that no more was meant, for therein the court had said that writing and signing

the will and superintending its execution was a sufficient publication by the testator, and that in attesting it the witness attested its publication; and therewith agree the cases. But there is no intimation that the witnesses must know the character of the instrument. And the quotation from Ilott v. Genge, 3 Cutt. Ecc. 181, is to the same effect, for, although it says that when a testator writes the will himself, and signs it, and produces it to the witnesses, and desires them to sign their names, that amounts to an acknowledgment on his part that the paper signed by them is his will; yet this is not saying that the witnesses thereby know it to be his will, but only that he himself knows it. That case arose under the Statute of 1 Vict., under which it had always been held that, when the signature of the testator is seen or expressly acknowledged, it is not material that the witnesses are not told that the instrument is a will.

We hold, therefore, that our statute does not require that the attesting witnesses to a will shall know the nature of the instrument.

It appeared that the witnesses were in the store of one of them when they signed, but it did not appear how large the room was, except that it was a country general store. The jury asked if it was enough that the witnesses were in the same room. The court replied that merely being in the same room was not enough; the room might have been so large; that the witnesses must have been together in the presence of one another in such a way and in such a sense that they could see one another sign, whether they actually looked and saw or not; that they must have been right there where they could see one another sign. This is in substantial accord with Blanchard's Heirs v. Blanchard's Heirs, 32 Vt. 62, and so no error. Reversed and remanded.

Attestation Must Be in the Presence of the Testator.

CUNNINGHAM v. CUNNINGHAM ET AL.

80 Minn. 180, 183 N. W. 58, 51 L. R. A. 642, 81 Am. St. Rep. 256. 1900.

COLLINS, J. Gen. St. 1894, Sec. 4426, provides: "No will, except such nuncupative wills as are hereinafter mentioned,

shall be effectual to pass any estate, real or personal, or to change, or in any way affect the same, unless it is in writing, and signed at the end thereof, by the testator, or by some person in his presence, and by his express direction, and attested and subscribed in his presence, by two or more competent witnesses." And the only question in issue on this appeal is whether the alleged will was attested and subscribed in the presence of the testator, Cunningham, by the two persons whose names were attached as witnesses.

The testator had been confined to his room for some time. It was a small bedroom with a doorway which led into a large room upon the north, the head of his bed being near the partition between the two. There was no door, but a curtain had been hung in the doorway, which was drawn to the west side at the time in question. Three days before the signing the testator sent for his attending physician, Dr. Adams, to come to his house, and draw his will. At the same time he sent for Dr. Dugan to be present as a witness. The draft of a will made by Dr. Adams as dictated by Cunningham was unsatisfactory, and both physicians went away. They were again summoned November 12, 1899, and went to the house in the forenoon. Dr. Adams drew a new will as instructed by Cunningham, the latter remaining in his bed. When the document was fully written, both men stepped to the bedside, and Dr. Adams read it to the sick man. Having heard it read through, Cunningham pronounced it satisfactory, and then signed it. When so signing he sat on the edge of the bed, and used as a place for the paper a large book which was lying upon a chair. Drs. Adams and Dugan were then requested to sign as witnesses. For this purpose they stepped to a table in the sitting room, which stood about 10 feet from where Cunningham sat, and there affixed their signatures. The time occupied in so signing did not exceed two minutes, and immediately thereafter Dr. Adams returned to the bedside with the paper. Dr. Dugan stepped to the doorway, about three feet from Cunningham, and then Adams showed the signatures of the witnesses to him as he sat on the edge of the bed. Cunningham took the paper, looked it over, and said, in effect, that it was all right. From where he sat he could not see the table which was used by the witnesses when signing. He could have seen it by moving two

or three feet. While they were signing he leaned forward, and inquired if the instrument needed a revenue stamp, to which Dr. Adams replied that he did not know, the reply being audible to Cunningham.

These are the salient and controlling facts found by the court below, on which it based an ultimate finding that the instrument so witnessed was attested and subscribed in the presence of the testator, and then affirmed the order of the probate court admitting it to probate as the last will and testament of the deceased.

The appellants (contestants below) insist that the attestation and subscription by the witnesses were insufficient, because Mr. Cunningham did not and could not see the witnesses subscribe their names from where he sat, and their contention has an abundance of authority in support of it from jurisdictions in which statutes copied from the English law on the subject, and exactly like our own, are in force. The rule laid down in these authorities is that the attesting and subscribing by the witnesses must take place within the testator's range of vision, so that he may see the act of subscribing, if he wishes, without a material change of his position; and that he must be mentally observant of the act while in progress.

Lord Ellenborough thus stated it in Doe v. Manfold, 1 Maule & S. 294: "In favor of attestation it is presumed that, if the testator might see, he did see; but I am afraid if we went beyond the rule which required that the witness should be actually within reach of the organs of sight, we shall be giving effect to an attestation out of the devisor's presence, as to which the rule is that, where the devisor cannot, by possibility, see the act doing, that is an act out of his presence."

Construing the same words in the Illinois statute, it was recently held: "The act of attestation consists in the subscription of the names of the witnesses to the attestation clause as a declaration that the signature was made or acknowledged in their presence. It is this act of attestation by subscribing their names to the will as witnesses thereto which the statute requires to be in the presence of the testator. The object of the law, as frequently declared, is to prevent fraud or imposition upon the testator, or the substitution of a surreptitious will; and to effectuate that object it is necessary that the testator shall be

able to see and know that the witnesses subscribed their names to the paper which he has executed or acknowledged as his will. The purpose of the statute is not attained by mere ability to see the witnesses, or some part of them, but the act of attestation is the thing which must be in the presence of the testator. * * * It would not be an attestation in the presence of the testator, if he could not see the attestation, but merely understood from the surrounding circumstances that the act was taking place." Drury v. Connell, 177 Ill. 43, 52 N. E. 368.

In brief, the courts have, almost without exception, construed a statute requiring an attestation of a will to be in the "presence" of the testator to mean that there must not only be a consciousness on the part of the latter as to the act of the witnesses while it is being performed, but a contiguity of persons, with an opportunity for the testator to see the actual subscribing of the names of the witnesses, if he chooses, without any material change of position on his part. And yet an examination of the decided cases wherein the ever-varying circumstances and conditions have been considered, and this rule applied, will convince the reader that the task of application has not been an easy one, and has led to surprising results at times. Some years ago a large number of American and English cases were collected in a note appended to Mandeville v. Parker, 31 N. J. Eq. 242, and an examination thereof will show the absurd and inconsistent positions in which the courts have frequently placed themselves.

As will be seen from the facts surrounding the cases mentioned in this note, or cited in the text-books in support of this rule, it has been held almost universally that an attestation in the same room with the testator is good, without regard to intervening objects which might or did intercept the view; and also that an attestation outside the room or place where the testator sat or lay is valid if actually within his range of vision. And no court seems to have doubted that a man unable to see at all could properly make a will under the statute, if the witnesses attested within his "conscious" presence, whatever that means. Exactly why or how an exception in the case of one temporarily or permanently blind can be injected into this statute has not been attempted by any court or writer, so far as we know. Nor has there been any success in the effort to

show why one kind of an intervening object—a partition wall, for instance—is better calculated to afford an opportunity for the perpetration of a fraud upon the testator than is another kind, say, the closed curtains of an old-fashioned bed, or the head or foot board of a bedstead, or any other article of furniture which happens to be an obstruction to the sight.

Again, it is difficult to see what sound distinction can be made, when applying the rule, between a case where the testator can see the witnesses attest, if he chooses to lean his body forward a few inches, and the case where the act can be seen if he steps forward the same distance. Or, take a case where a testator has been injured, and is compelled to lie on his back with his eyes fixed on the ceiling. Must the witnesses affix their signatures from an elevation in order to sign in his presence? No case has gone that far, and yet what difference would it make with such a testator in fact or in sound reason if the will was attested 10 feet distant, on a table in an adjoining room, or on a table the same distance from the bed, but in the same room?

Take the case at bar. The testator sat on the edge of his bed when the witnesses signed at the table in the adjoining room, a few feet distant, and within easy sound of his voice. If he could have seen them by leaning forward, the authorities in favor of upholding the will are abundant. Physically he was capable of stepping two or three feet forward, and from this point the witnesses would have been within his range of vision. It is extremely difficult to distinguish between the two cases, and yet it has been done again and again in applying the rule.

We might continue these suggestions and queries, as has been done quite frequently by courts which have not been entirely satisfied with a very rigid construction of the statute, and have not hesitated to say so; but it seems unnecessary, for there is one feature in these findings of fact which is sufficient in our judgment, to warn an affirmance, although there are many decisions to the contrary. As before stated, the court found that the witnessing of the will consumed not more than two minutes, and that immediately thereafter Dr. Adams returned to the testator while Dr. Dugan came to the doorway, not over five feet distant, whereupon the former "showed the signatures of the witnesses to the testator. The latter took the will, looked it over, and said in effect that it was all right."

To say that this was not a sufficient attestation within a statute which requires such attestation to be in the "presence" of the testator, simply because the witnesses actually signed a few feet out of the range of his vision, is to be extremely technical without the slightest reason for being so. The signing was within the sound of the testator's voice; he knew what was being done; the act occupied not more than two minutes; the witnesses returned at once to the testator; their signatures were pointed out to him; he took the instrument into his own hands, looked it over, and pronounced it satisfactory. The whole affair, from the time he signed the will himself down to and including his expression of approval, was a single and entire transaction; and no narrow construction of this statute, even if it has met the approval of the courts, should be allowed to stand in the way of right and justice, or be permitted to defeat a testator's disposition of his own property.

In Cook v. Winchester, 81 Mich. 581, 46 N. W. 106, 8 L. R. A. 822, it was said: "In the definition of the phrase 'in the presence of' due regard must be had to the circumstances of each particular case, as it is well settled by all the authorities that the statute does not require absolutely that the witnessing must be done in the actual sight of the testator, nor yet within the same room with him. If, as before shown, they sign within his hearing, knowledge, and understanding, and so near as not to be substantially away from him, they are considered to be in his presence."

But, as was said, in substance, in the same case, we agree that this will was validly executed expressly on the ground that the whole transaction was an entirety in fact, and that, immediately after the witnesses had attested, the instrument was returned by them to the hands of the testator, his attention was called to their signatures, and he expressed his satisfaction and approval of what had been done. This view, which does no violence to the spirit and intent of the statute, is not without precedent and authority aside from the Michigan case, although it may, as said by the court below, run contrary to a majority of the decisions. See Sturdivant v. Birchett, 10 Gratt. (Va.) 67, and Riggs v. Riggs, 135 Mass. 238, 46 Am. Rep. 464.

Judgment affirmed.

In Re BEGGANS' WILL.

68 N. J. Eq. 572, 59 Atl. 874. 1905.

MAGIE, ORDINARY. * * * The attestation clause appended to the paper was not in the usual form. It reads thus: "We, the undersigned, witnessed Mrs. Ann Beggans sign this paper, which she declared and acknowledged to be her last will and testament. Michael B. Holmes. Peter F. Maguire."

* * * * * * * * *

When an attestation clause states the performance of some of the requisite acts, but omits to state the performance of acts also requisite, on reason and authority the proponent must establish by evidence the performance of the latter acts. Ayres v. Ayres, 43 N. J. Eq. 565, 12 Atl. 621.

It will be observed that by the attestation clause now under consideration the subscribing witnesses assert the performance of two requisite acts thus: (1) That the deceased "declared" the disputed paper "to be her last will and testament," and (2) that they "witnessed" the deceased "sign this paper." They wholly omit to certify that they subscribed their names thereto in the presence of deceased. This requisite of the statute is designed to prevent substitution and fraud upon an intending testator (Mandeville v. Parker, 31 N. J. Eq. 242), and no amount of proof that the very paper signed by deceased was that which the subscribing witnesses signed will avail to establish it as a will if it fails to show that their signatures were affixed in the presence of the deceased.

* * * * * * * * *

The third question is whether proponent's proof establishes the fact that the witnesses subscribed their names to the paper in the presence of deceased.

On this subject the attestation clause is silent, and the subscribing witnesses are again at variance. Both, however, agree that their act of subscribing was not done in the room in which deceased was, but in the adjoining room, at a table therein. They disagree as to the position of the table at that time, Maguire asserting that it was in the center of that room, and Holmes asserting that it was on one side of that room. It is conceded that if it was in the center deceased could not have

seen the act of the witnesses in subscribing, while if it was on the side, as fixed by Holmes, the deceased could have seen the act if she had turned in that direction.

A diagram of the bedroom and of the adjoining room and the various pieces of furniture therein was put in evidence. It was made under the instruction of the daughter of the deceased, who is the principal beneficiary under the will. She placed the table at which Holmes said the witnesses signed in the position in which she says it was at the time. Assuming that the daughter correctly pointed out to the draftsman of the plan the respective positions of the furniture, it thereby appears that deceased, who was ill, was lying in a bed, the head of which was against the partition between the bedroom and the adjoining room. The door between those rooms was a sliding door, and open. The table in the adjoining room was in such a position as to leave a possible vision to one lying on the bed for a width of three and one-half feet. But in order to see the act of the witnesses in subscribing, the deceased would have been obliged not only to turn her head, but to look, as it were, above her head. If deceased was sitting up in the bed, she would have been obliged to turn her head over her shoulder in order to see the witnesses.

There is no satisfactory proof as to which position deceased was in when the signatures of the witnesses were made, and no proof at all that she turned her head, or placed herself in a position to see that act.

In Mandeville v. Parker, 31 N. J. Eq. 244, Chancellor Runyon declared that under our statute requiring the subscribing witnesses to a will to sign in the presence of the testator an attestation in the same room in which testator is, is prima facie an attestation in his presence, and, on the other hand, an attestation made in another room is prima facie not made in his presence.

In Ayres v. Ayres, 43 N. J. Eq. 565, 12 Atl. 621, Chancellor McGill applied that doctrine to a case in which the witnesses' signatures were affixed in the same room, upon a bureau at the foot of the bed on which deceased was lying. Upon the proofs he found that deceased at the time was so supported that he could see the motions of the pen used by the witnesses, though he could not distinguish the letters the pen was forming,

and that his eyes were open during the signing; and he held that the signing under those circumstances was a sufficient compliance with the statute.

If, in the case in hand, it had been made to appear that the deceased placed herself in a position to see the witnesses signing, and was looking in that direction, it may be that the presumption that the signing in the adjoining room was not a signing in her presence would have been overcome. But, in the absence of such proof, the presumption is not overcome. If Holmes is correct in his description of the place of signing by the witnesses, the signing is not shown to be a sufficient compliance with the statute. If Maguire is correct, the signing could not have been seen by deceased. The decree is therefore supported on this ground. * * *

CHAPTER VIII.

REVOCATION OF WILLS.

By Subsequent Instrument.

SIMPSON v. FOXON.

P. 54 (Eng.). 1907.

On March 15, 1898, John Foxon made a will disposing of all of his property and appointing his daughter executrix. On September 11, 1903, he duly executed as a will a document on a printed form commencing: "This is the last and only will and testament of me, John Foxon." This document disposed of only a life insurance policy of £4 13s and appointed William Biggs executor. On April 11, 1905, he duly executed as a codicil a further document described as "a codicil to the last will." This codicil gave certain bequests, revoked all previous appointments of executors and trustees, and appointed Herbert Simpson and William Biggs to be joint executors and trustees "of my will."

SIR GORELL BARNES, PRESIDENT. There is no doubt to my mind that, as a matter of fact, the deceased cannot really have intended the policy form of will to have been a revocation of his general dispositions and to have left himself intestate as to the greater part of his property. I do not suppose that anyone, having these facts before him, could come to the conclusion that the deceased did so intend.

But what a man intends and the expression of his intention are two different things. He is bound, and those who take after him are bound by his expressed intention. If that expressed intention is unfortunately different from what he really desires, so much the worse for those who wish the actual intention to prevail. The principle has been very fully considered in a number of authorities. I think there is a good deal more authority than was stated to me in the arguments. The numer-

ous authorities reported, such, for instance as Plenty v. West (1845), 4 Notes of Cases, 103, 1 Rob. 264, where the words in question were "this is the last will," arose out of some difference of opinion which existed in former days as to the effect to be given to those words, but which may safely be considered as set at rest by the later decisions. The words "the last will" would not revoke a former will, if not inconsistent with it; the last will might even tend to confirm what had gone before. And so it is necessary to see what are the provisions in the last will, and if these provisions are inconsistent with those in the earlier document it may be that the later revokes the earlier one. But it does not necessarily follow that it always will do so if the two documents can stand properly together.

The principle to be generally applied in considering matters of this kind is very well stated in Lemage v. Goodban (1865), L. R. 1 P. & D. 57, at page 62, where Lord Penzance, quoting from Williams on Executors (6th Ed.) p. 156 (in 10th Ed. pp. 119, 120), says: "The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly, or in effect, revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that as no man can die with two testaments, yet any number of instruments, whatever form they may be (so as they be all clearly testamentary), may be admitted to probate, as together containing the last will of the deceased. And if a subsequent testamentary paper be partly inconsistent with one of an earlier date, then such latter instrument will revoke the former, as to those parts only, where they are inconsistent." The learned judge added: "This passage truly represents the result of the authorities;" and he continued as follows: "The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each so executed. Redundancy or repetition in such independent papers will no more necessarily vitiate any of them, than similar defects if appearing on the face of a single document. Now it was argued that in the case of more than one testamentary paper, each professing in form to be the last will of the deceased, it is

necessary for the court, before concluding that they together constitute the will, to be satisfied that the testator intended them to operate together as such. In one sense this is true, for the intention of the testator in the matter is the sole guide and control. But the 'intention' to be sought and discovered relates to the disposition of the testator's property, not which, or what number, of papers did he desire or expect to be admitted to probate?—is the true question. And so this court has been in the habit of admitting to probate such, and as many papers (all properly executed) as are necessary to effect the testator's full wishes, and of solving the question of revocation by considering not what papers have been apparently superseded by the act of executing others, but what dispositions it can be collected from the language of all the papers that the testator designed to revoke or to retain."

That being the principle which seems to me applicable to the present case, I do not feel any difficulty in arriving at a decision upon it. In my opinion all three documents should be admitted to probate. I do not think, having regard to the circumstances which these testamentary papers disclose, that the words "last and only" can be taken as revoking what had been done by the previous will.

The document which contains the words in question is a printed form, evidently drawn up for the purpose of disposing of a policy of assurance only and appointing an executor to deal with that matter only. It is very unfortunate that it should have been drawn in this way, but it is, notwithstanding the words "and only," not intended to be a complete disposition of the testator's property.

If the other view were adopted it would lead to this, that apart from the insurance money, the whole of this man's property would remain undealt with, except as to what is disposed of by the codicil, although the testator cannot possibly have had any idea that he had not disposed or was not disposing of all that he could have dealt with.

The words "last and only" cannot be treated as an express revocation; and, applying the principles I have already referred to, the dispositions of this man's property seem to me to show that the document in question was not intended by him to be, and it is not, upon its face, a controlling and revoking disposi-

tion. In other words, neither by express intention nor by disposition of property can you gather that the words "and only" are to be treated as a revocation of the earlier will.

I grant probate of all three documents. The costs must, of course, come out of the estate.

By Destruction.

MILES' APPEAL.

68 Conn. 237. 1896.

FENN, J. Dianna M. Miles, late of Milford, in this State, died in 1891, being then about eighty-six years of age. She left a will dated and executed February 13th, 1879. This will, in addition to the formal parts and the clause appointing an executor, contained two sections only, which are as follows:—

"*First.* After all my lawful debts are paid and discharged I give, devise, and bequeath to my nieces, Susan Whittlesey and Isabel Newton, daughters of my brother, Charles, to each of them ten shares of the capital stock of The New York, New Haven & Hartford Railroad Company, being in all twenty shares of said capital stock, of the par value of one hundred dollars each, to them, their heirs and assigns forever.

"*Second.* I give, devise, and bequeath all the residue and remainder of my property and estate, both real and personal, of whatever kind and nature, to my brothers, Charles, David, and Henry Carrington Miles, share and share alike, to them, their heirs and assigns forever."

When this will was presented in the Court of Probate, lines appeared drawn through all that part of the above recited first section, after the words, "First. After all my lawful debts are paid and discharged I;" that is to say, commencing with the word "give," and ending with the word "forever." The words over which said lines were drawn were in no other manner canceled or obliterated, but remained perfectly legible.

The case came to the Superior Court on an appeal from an order and decree of the Court of Probate for the district of Milford, denying the application of the then appellants, that the words and clauses above referred to, through which lines were

drawn, be admitted to probate, and in disapproving and disallowing said words and clauses, and in proving, approving, allowing and admitting to probate said will without said words and clauses. The Superior Court rendered judgment reversing the decree of the Court of Probate. From this judgment the original appellees appealed to this court. They thus in turn became appellants, and will be so regarded and styled in this opinion. The original appellants will be called the appellees.

Upon the trial in the Superior Court no exceptions to rulings upon evidence, or to anything which occurred during the presentation of the case, were taken. The court made a finding of the facts upon which its judgment was based, and the sole questions of law relate to the sufficiency of said finding to support and vindicate such judgment. The claims made by the appellants are stated in the finding, and were: that the facts found were sufficient in law to establish the fact that either the testatrix herself made said erasures, or caused the same to be made in her presence, and that upon said facts found the erasures in question constituted a valid revocation of said bequest in said will; that the legal presumption was that said erasures were made by the testatrix, and that the burden of proof was upon the appellants to show that said erasures were not made by her, or by some person in her presence by her direction. The appellees claimed otherwise, and further, that a portion of a will could not in this manner be revoked under the statute of this State.

The statute referred to, in force at the time the will in question was made, is now part of General Statutes, § 542. It provides: "No will or codicil shall be revoked in any other manner except by burning, canceling, tearing, or obliterating it by the testator or by some person in his presence by his direction or by a later will or codicil." There must of course in any given case be a will, otherwise valid and operative, before the question as to how it may be revoked will arise. There was one here, but lines had been drawn through a certain portion of it after execution, and before exhibition in the Court of Probate. The sole inquiry was: Did this fact operate as a revocation, not indeed of the entire will, but of that portion of it? It could not so operate unless the requirements of the statute had been complied with. Waiving for the time the question whether such

cancellation, however effected, would constitute such partial revocation, it remains that in order to do it the act must be done by the testator, or by some person in his presence by his direction. Unless this be found, no finding that would justify a revocation exists. The court has made no such finding in this case. On the contrary the judge said: "I do not find that said erasures were made by the testatrix or in her presence."

But the appellants urge that the court did find certain evidential facts, and that upon these facts the legal presumption was that the cancellation was made by the testatrix *animo revocandi,* and that the burden of proving the contrary was upon the appellecs. A word in explanation of this claim, as the appellants make it, may be called for. They do not assert that in every case, and at the outset, a burden rests upon the proponents of a will to prove not only the affirmative, that it was once valid, but also the negative, that it has not been afterwards revoked, either wholly or in part; to prove the case and anticipate and disprove the defense. This being so, they do not mean that a burden of proof is upon the appellants "in the first instance"—Knox's Appeal, 26 Conn. 20, 22—but only a burden "shifted," if such expression is ever proper, and it is sometimes used. Barber's Appeal, 63 Conn. 393, 403. The main facts upon which the appellants rely in support of this claim of a legal presumption in their favor, are these:—

"The will in question was drawn by Charles Miles, the executor, in 1879, at the time it bears date, and remained in his possession unchanged until the fall of 1885, when David Miles, a brother to the testatrix, and one of the residuary legatees, sent for the will, and in pursuance of his request Charles Miles sent said will to said David. Shortly after the will was so sent by Charles Miles to David Miles, the testatrix handed to David Miles an envelope upon the outside of which was written, 'Diana Miles' will,' and said to him, 'There is my will.' As she handed the will to David he said to her, 'Are you satisfied with it now?' and she replied, 'Yes.' It did not further appear in evidence how or when or for what purpose, the testatrix had received said will from David Miles after he had received it from Charles Miles, as aforesaid. From that time the will remained in the possession of said David Miles, until his death in December, 1885. A few days after the death of

David Miles, at the request of the testatrix, the will was delivered to Henry C. Miles, a brother of the testatrix, who from that time kept it in his possession until it was filed in the Court of Probate by said Henry C. Miles, in February, 1892. The erasures in question were made prior to delivery of the will to Henry C. Miles, after the death of David, aforesaid." They were not made prior to the time the will was sent by Charles Miles to David Miles, in 1885. "In the fall of 1881 said Henry C. Miles, who had procured a copy of said will, said to the testatrix, 'By your will you have given my brother Charles' family twenty-four shares of the New York & New Haven Railroad stock, and you have given brother David and myself eight.' The testatrix replied, 'I won't have it so: I will scratch it out.'" The court reciting these facts added: "From the appearance of said erasures and from all the facts aforesaid, I believe that said erasures, though made at the request of the testatrix, and for the purpose of revoking the provision of the will over which said lines were drawn, were not made by the testatrix herself."

We discover nothing in these facts which raises what may be called a legal presumption in favor of the appellants, if by that term was meant anything more than that such facts, or some of them, have a recognized and declared probative right, sufficient under some circumstances to establish a prima facie case. Concerning such presumptions, so called, there is in the books an infinite variety and contrariety of statement. But it is useless here to enter into a discussion of the matter, for upon the record before us we can see no reason to think the trial court failed to give to each item of evidence its full weight, whether naturally pertaining or arbitrarily attached to it by the law. It was the duty of the court to weigh all the evidence, and we cannot say that it did not do so, and correctly. In other words, if the appellants meant by their claim that facts found were sufficient as a matter of law to establish conclusively, irrefutably, the fact that the testatrix either herself made such erasures, or caused the same to be made in her presence, such claim is not correct, and no authority has been cited or exists anywhere to support such claim. But if it is only meant that such facts shift, satisfy or discharge a burden, casting it upon the other side, not to prove the contrary, but to disprove or

overcome that, not to establish a negative, but to overcome an affirmative, we cannot say, nor do we believe, that the court below considered or acted otherwise than with the same view.

It was further claimed by the appellees, as we have seen, that a portion of a will could not be revoked in the manner considered. If this be correct, it in itself furnishes a full justification of the decision of the court below. For the reasons already stated, we do not need to place our decision upon this ground; yet we ought not to pass it by without some reference and consideration. It would perhaps be too strict a construction of the statute referred to, if we held that under no circumstances could there exist a partial revocation of a will or codicil, effected by burning, canceling, tearing or obliteration; that such revocation must extend to the whole instrument and be operative to revoke the whole, or be without effect. Such a construction has indeed been given to very similar statutory provisions in several other jurisdictions. But probably the weight of authority upon the question is otherwise. The entire subject is most exhaustively and ably treated in a note to the case of Graham v. Birch, 28 Amer. St. Rep. 344. But on the other hand if we were to declare, following the language of the opinion often cited in Bigelow v. Gillott, 123 Mass. 102, that the authority to revoke an entire will included the lesser power to revoke any portion of it only, and to stop there, as the court in Massachusetts does, it seems to us that an inference might be drawn that would extend entirely too far. For, if such conclusion, looking at the statute in question alone, might be drawn, there is another statute appearing upon the same page of the General Statutes, namely, § 538, providing how wills must be executed. If a case arises which is simply and purely one of revocation, § 538 will not apply. But if such revocation involves alteration, it certainly must apply. The difference in meaning between the two terms is aptly stated by Mellish, L. J., in Swinton v. Bailey, 45 L. J. Ex. 427, where a testator by his will had devised his real estate to E, "her heirs and assigns forever." He subsequently obliterated these words with pen and ink. The judge said (p. 429): "The difference between revocation and alteration seems to me to be this: if what is done simply takes away what was given before or a part of what was given before, then it is revocation, but if it gives something

in addition, or gives something else, then it is more than revocation and cannot be done by mere obliteration." In Eschbach v. Collins, 51 Md. 478, is an able discussion of this matter. In that case the effect of erasures was to enlarge the estates of the devisees from life estates to fees. The court held such erasures inoperative under a statute which provided that a will, or any clause thereof, might be revoked by cancellation. The court said (p. 499): "The will has not been revoked; it has been altered. It cannot be supposed that when the legislature uses the word 'revocation,' it is to be construed to mean 'mutation.' * * * When by the obliteration of certain words a different meaning is imparted there is not a mere revocation. There is something more than the destruction of that which has been antecedently done. There is a transmutation by which a new clause is created. There is another and a distinct testamentary disposition which must be authenticated by the observance of the statutory requirements." The court gives as an illustration of how fully such a transmutation might be made by mere erasures, this example: Suppose the original words were, "To my son, William, I give nothing, and give all my estate to my son, John." The will with no addition could be made to read, "To my son, William, I give all my estate." This may seem an extreme illustration, but probably there are few wills made, of any considerable length, in which alterations in meaning, by mere erasure, could not be effected, as objectionable, if not as marked as this. Indeed, without holding that there are none, it seems to us that there are few cases that could arise where the revocation of a portion only of a will, would not operate to alter other portions of it. If an entire clause—meaning by that word one of those distinct and generally numbered subdivisions into which wills are frequently aparted, or an entire unconnected provision making disposition of property—be erased or canceled, and what was thus disposed of becomes intestate, it may be said that there is a revocation, and nothing more.

The same thing has been affirmed by some courts where, instead of such intestacy, the property passes into a prescribed residuum. But this appears to us to be more questionable. The residuary devisee or legatee takes by virtue of the will, defeating the heir, and he takes by force of the alteration what

he did not take without it. The mischief seems the same. The distinction is more apparent than the difference. Take the very case before us: There were originally two clauses. One disposed of certain stock; the other of the balance of the estate. By revoking the first, there ceased to be any residue, unless the estate in its entirety can be so styled. But look at the object of the change. Was it revocation, or was it alteration? One of the brothers of the testatrix procured a copy of the will from another brother who had it in his possession. He was apparently curious until he knew its contents, and dissatisfied when he learned them. He said to his sister, "By your will you have given my brother Charles' family twenty-four shares of the New York & New Haven Railroad stock, and you have given my brother David and myself eight." She said, "I won't have it so; I will scratch it out." What was this interested brother's motive? To defeat his nieces of their legacies? Or was it rather to increase his own? What would the old lady "not have so"? That her nieces should be remembered, or that the families of those brothers should be treated unequally? It seems to us the answer is obvious, and that to all just intents and purposes here was not merely revocation but substitution; not destruction, but reconstruction; a "scratching out" indeed, but one equivalent to a writing in; the making of a new testamentary disposition, and in a manner not permitted by law—a law passed in the interest of public policy, the wisdom of which such a case as the present abundantly demonstrates.

There is no error.

In this opinion the other judges concurred.

What Constitutes Destruction?

In Re KISSAM'S WILL.

59 Misc. Rep. 307, 110 N. Y. Supp. 158. 1908.

MILLARD, S. The last will and testament of Harriet Kissam, executed and attested in manner prescribed by law, has been presented for probate. It is accompanied by an instrument in writing, duly acknowledged, executed by all the heirs

at law, and next of kin of decedent, waiving the issuing and service of citation, and consenting that will be admitted to probate. It appears by an examination of the will, which is typewritten, that a part of the second clause has been erased. The statute directs that the surrogate "before admitting a will to probate must inquire particularly into all the facts and circumstances, and must be satisfied of the genuineness of the will and the validity of its execution." Code Civ. Proc., § 2622; Matter of Bartholick's Will, 141 N. Y. 166, 172, 36 N. E. 1.

Inquiry into the facts and circumstances by examination of two credible witnesses, the scrivener, who also was one of the subscribing witnesses, and the testatrix's sister, to whom testatrix read the will after it was executed, clearly and distinctly established that, at the time of the execution and attestation of the will, the second clause thereof read, "Second, I give and bequeath, subject to said life estate, to Mrs. Lillian Roome and Miss May A. Husted, of Washington, D. C., each, the sum of five thousand (5,000) dollars"; and that thereafter the testatrix altered such second clause by erasing the words "and Miss May A. Husted" and the word "each."

The testatrix could not by such erasure alter her will. It is provided by 2 Rev. St. (1st Ed.) pt. 2, c. 6, tit. 1, § 42, that "No will in writing, nor any part thereof * * * shall be revoked or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed." The effect of this statutory provision is to prevent a testator from altering his will, otherwise than by an instrument executed in the same manner as required to give it effect as a will. The statute has surrounded the execution of testamentary instruments with certain forms and ceremonies as a shield and protection against fraud and imposition, and the purpose of such precautionary measures might be entirely defeated, if held only to the original execution, leaving all subsequent alterations to be made without such protection. The aim of the statute is to close the door against opportunities of fraud and alterations in a will except by the observance of the same formalities as in its execution.

In Lovell v. Quitman, 88 N. Y. 377, 42 Am. Rep. 254, it

appears that after will was executed, the testatrix obliterated clauses numbered "2nd" and "4th" with intent to revoke the same. Held, that the obliteration was not effectual for that purpose, and that the will remained in full force and effect as before. In Quinn v. Quinn, 1 Thomp. & C. 437, after will was executed, the testator made alterations by erasing and interlining. Held, that the testator could not by an erasure partially revoke his will, and that will should be probated as originally written. In Stevens v. Stevens, 6 Dem. Sur. 262, 3 N. Y. Supp. 131, the testatrix, after the execution of her will, attempted to alter it by having a bequest written on a separate piece of paper and pasted on the will, cutting the latter in two for that purpose. Held that the attempted bequest was ineffectual, and that the original will was not rendered invalid. In Matter of Carver's Estate, 3 Misc. Rep. 567, 23 N. Y. Supp. 753, it was held that the effect of an unauthenticated erasure in a will made after execution is to render the change sought to be made, inoperative, leaving the will to stand in form and effect as before the alteration was attempted. In Matter of Lan's Will, 9 Misc. Rep. 521, 30 N. Y. Supp. 388, it was held that alterations and erasures made after the execution of a will will not invalidate it if the original intention of the testator can be ascertained. In Matter of Prescott, 4 Redf. Sur. 178, it was held that where a testator, after the execution of his will, makes erasures and interlineations therein, without intending to revoke the will, and without re-executing the same, the will must be admitted to probate as originally executed. In Dyer v. Erving, 2 Dem. Sur. 160, it was held that after one has signed and published an instrument, as and for his last will, though he may revoke it by destruction, or annul or modify it by another writing executed with due formalities, he cannot otherwise vary its terms by additions, interlineations, obliterations, or erasures on its face. In Matter of Westbrook's Will, 44 Misc. Rep. 339, 89 N. Y. Supp. 862, will after execution was altered by cutting out its first subdivision and fastening together the remaining parts; the piece cut out could not be found. The scrivener who was also one of the subscribing witnesses testified as to the missing clause, which the court held was sufficient proof of that portion and admitted will to probate as originally executed.

It being the duty of the surrogate to admit a will to probate as executed, and to disregard alterations made without formalities prescribed by statute, it necessarily follows that the Surrogate has power to take proof of the provisions of the instrument before alteration. A decree will be entered admitting will to probate as originally written and executed.

By Cancellation.

LADD'S WILL.

60 Wis. 187. 1884.

The case is thus stated by Mr. Justice Cassoday:—

"It appears from the record and, in fact, is admitted by all parties and, in effect, found by the court, that the will of the testatrix was duly made, executed, attested, witnessed, published, and declared as a will, July 29, 1870, in the State of New York, but in strict conformity with our Statutes, and that the will is entitled to probate, if not revoked; that the paper upon which the will was written was a very large, thick, double sheet, the first page of which was originally a printed blank form of a will, the blanks of which were filled up with the writing; that the written and printed parts constituting the will were wholly upon the first page, that nothing was written or printed upon the second or third page of the sheet,—they being entirely blank; that the usual indorsement by the scrivener was upon the fourth or outside page of the wrapper leaf, and upon which there was also written in pencil, in the handwriting of the testatrix, the words: 'I revoke this will. Mary P. Ladd, October 7, 1879.'

"October 7, 1882, the testatrix died, in Grant county, Wisconsin, where she then, and for several years had had her residence and domicile. The testatrix retained the will until her death, when it was found in the bottom of her trunk, tied up with her decree of divorce, and covered with a newspaper. The Circuit Court, affirming the decision of the County Court, held that the will was revoked by the writing in pencil, and judgment was entered accordingly."

CASSODAY, J. The frauds incident to allowing written wills to be set aside by parol testimony finally culminated more than two hundred years ago in the trial of the feigned issue in Cole v. Mordaunt, where it appeared at the bar of the King's Bench that most of the nine witnesses against the will were guilty of deliberate perjury, and the widow who sought to set aside the will was guilty of subornation of perjury. On a petition for a review of the case, Lord Chancellor Nottingham remarked that "he hoped to see one day a law that no written will should ever be revoked but by writing." See notes to Mathews v. Warner, 4 Ves. Jr. 196; Prince v. Hazelton, 20 Johns. 513. This remark and that trial led to the enactment of the Statute of 29 Chas. II., "for the prevention of frauds and perjuries," in the following year. 3 St. at Large, p. 385, ch. 3. In fact, the eminent father of equity himself introduced the bill, as he afterwards stated in Ash v. Abdy, 3 Swanst. 664; 4 Lives Ld., ch. 271.

Section 6 of that chapter prescribed the manner in which a "devise in writing of lands, tenements, or hereditaments," or "any clause thereof," might be revoked, and prohibited revocation in any other manner. Our Statute relates to personal property as well as real estate, and has some words transposed, and is slightly different in some other respects; but otherwise § 2290, R. S., is substantially the same as that of § 6. The Statute is imperative upon the court, and is to the effect that "no will, *nor any part thereof*, shall be revoked unless by (1) *burning*, (2) *tearing*, (3) *cancelling*, (4) *obliterating* the same, *with the intention of revoking it*, by the testator, * * * or by some other (5) *will* or (6) *codicil* in *writing*, executed as prescribed in this chapter, or (7) by some other *writing, signed, attested,* and *subscribed* in the *manner provided* in this chapter *for the execution of a will.*" § 2290, R. S.

Here are seven ways prescribed for revoking a will, and all other ways, except such as are implied by law, are expressly prohibited. Each of the first four is by doing a specified act to the will itself, with the intention of revoking it. Each of the last three must not only be in writing and signed, but also attested and subscribed in the presence of the testator by two or more competent witnesses. § 2282, R. S. It stands confessed that the writing in pencil was never attested or subscribed by

any witness, much less by two witnesses in the presence of the testatrix. This failure to execute in the manner prescribed by the Statute manifestly prevented the words written in pencil from going into effect as a written revocation.

It should be observed that the written and printed matter constituting the will was wholly on the first page of the double sheet. The second and third pages were entirely blank. The pencil writing was upon the fourth page,—the outside of the wrapper leaf. Nevertheless, it is urged, in effect, that it was upon the same sheet of paper upon which the will was written, though remote from the writing, and hence that it should be held to have been done to the will itself; and that since the act so done consisted in writing words disclosing an intent to revoke, it must be held to be a "cancellation" of the will, "with the intention of revoking it," within the meaning of those words as used in the Statute. This, however, assumes that the second half-sheet of the paper, upon which no part of the will appears, constitutes a part of the will. If this is so, then a sheet of paper may be never so large, and yet if a will be written upon one corner, and words indicating an intention to revoke be written upon another corner, however distant from every part of the first writing, yet it would have the effect to cancel the will. Would this be a fair construction of the Statute? Would such a construction prevent "frauds and perjuries," according to the original intention of those who enacted the Statute? Or would it be more in harmony with that intention to hold that the written and printed matter together, found on the first page of the double sheet of paper in question, constitutes the will of Mrs. Ladd? Of course, there could be no written or printed matter except upon some substance, and hence so much of the first half-sheet of paper was essential to the existence and preservation of such written and printed matter, may, in a sense, be regarded as a part of the will. But no part of the double sheet of paper, much less any portion of the first half-sheet upon which the will was written and printed, was in the least burned or torn. Nothing was done to any portion of the written or printed matter constituting the will. No part of it was obliterated. No part of it was erased or cancelled. No interlineation was made. All that constituted the will remained intact. Every part of it remained

as perfect as when it was first written. The same would have been true if the second half-sheet had been entirely severed from the first. The only question is, whether it was cancelled, within the intent of the Statute, by the mere force of the meaning of the word "revoke" contained in the pencil writing. As observed, the Statute requires, not only the act of cancelling the will itself, but that it must be done with the intention of revoking it. * * *

In White v. Casten, supra, the paper upon which the will was written was burned through in three places, one of them being in the midst of the writing, and a large part was scorched, but the writing was not interfered with, when it was rescued against the testator's wish, and preserved against his knowledge, and it was held to be a revocation. The mere act of burning, tearing, cancelling, or obliterating the will itself, without the intent, is not enough. * * * So the mere intention to revoke the will, unaccompanied by any act of burning, tearing, cancelling, or obliterating done to the will itself, is not enough.

* * * * * * * * *

Some courts have held that where the testator is deceived into the belief that he had done an act sufficient to revoke the will it shall have that effect. Pryor v. Coggin, 17 Ga. 444; Smiley v. Gambill, 2 Head, 164. The case in Head was put on the ground that there was no such Statute in Tennessee, and the case in Georgia fails to refer to any Statute or decision. On the other hand, several of the above cases hold that where the legatee has falsely deceived the testator into the belief that he has in fact revoked his will, he shall be held in equity to hold the property as trustee for the heir; but that there can be no revocation except in one of the modes prescribed by Statute. * * * The question, however, is not here involved, and is referred to merely because counsel seem to rely in part upon the Tennessee and Georgia cases.

Even if such intention to revoke be expressed in writing never so strongly, and signed by the testator, yet, if the writing was never in fact attested and subscribed by the requisite number of witnesses, in the presence of the testator, so as to become effectual as a revocation under the Statute, it cannot operate as a revocation, when unaccompanied by any of the four acts, done to the will itself, specified in the Statute. * * *

In Kirke v. Kirke, supra, the codicil was signed by the testator, who, among other things, in effect therein declared: "I do hereby revoke that part of my said will" which has been erased, and in lieu thereof substitute what has been interlined; but it was held, by an eminent judge in such matters, that, although there was a clear intent to alter the will as indicated, yet that, as the codicil had not been duly executed and attested so as to pass real estate, such intention was ineffectual, and the original will was held to be in force the same as though there had never been any alteration.

In Locke v. James, supra, the testator erased the word "six" wherever it occurred in his will, but leaving it still legible, and inserted over it the word "two," and thereupon added, presumably upon the same paper, the following memorandum or codicil to his will, signed by him in the presence of one witness only: "The alterations in the first and second sheet, all relating to the said annuities left to my daughter, E. J., and her children, were made by me, the 15th of August, 1830. Witness my hand. R. N.;"—and Parke, B., speaking for the court, said that the "rent charge of £600 per annum, created by the will, duly executed and attested, * * * has not been cancelled, for the erasure was made *sine animo cancellandi,*" and that it "has not been affected by the codicil, for the codicil is not duly attested, and therefore cannot even be looked at, so far as the real estate is concerned."

In Jackson v. Holloway, supra, the testator, after having erased certain words and interlined others in place of them, and "at the same time indorsed on the will an instrument" to the effect that he had made the alterations named, and thereby renewed the will, which instrument was duly signed, sealed, and published by the testator in the presence of two persons, who also signed the same as witnesses in his presence. But because there were not three instead of two witnesses, as required by the Statute of New York, it was held that the erasures, interlineations, and the written indorsement so executed and witnessed, had no effect whatever upon the original will.

In Lewis v. Lewis, supra, the word "obsolete" was written by the testator upon the margin of his will, but it was held to be of no significance.

In Laughton v. Atkins, supra, it was strongly intimated, if

not held, that the written instrument containing words of revocation must itself be admitted to probate to have that effect.

In Cheese v. Lovejoy, supra, the testator had drawn his pen through the lines of various parts of his will, and then wrote on the back of it, "All these are revoked," and threw it among waste papers; but it was preserved, and it was held that there was no revocation, because the words "or otherwise destroying," in the present English Statute, were not satisfied. But that Statute does not contain the words "cancelling or obliterating," like ours, and ours does not contain the word "destroying," like theirs; and hence the case is distinguishable. But in the more recent case of Swinton v. Bailey, supra, the will was made prior to the Statute of Victoria, and the case was decided under the old Statute like ours, and it was held by the House of Lords that the words "her heirs and assigns forever," through which the testator had drawn his pen, had been obliterated, within the meaning of that word as used in the Statute of Frauds.

Counsel for the respondent insist that the revocation here was complete within the rule followed in Evans's Appeal, 58 Pa. St. 238. In that case the will was executed May 24, 1856, and the last clause of it spoke of two erasures and interlineations in their places. At the same time, and immediately beneath the signature of the testator, was a codicil, also signed by the testator, making two changes in the will. They followed the attesting clause and the signature of the witnesses. On or about July 21, 1858, the testator tore through three different clauses of the will, and made three erasures, one of which was so obliterated as to be illegible; and then made a second codicil, explaining such alterations and revocations. This second codicil was duly signed and published by the testator, in the presence of the requisite witnesses, who subscribed the same. Subsequently the testator tore the first codicil in two places, erased his signature thereto, and also erased his signature to the second codicil, and wrote beneath it the word "cancelled." The will and codicils were all upon the same sheet of paper. This paper was indorsed "Will," which was erased, and the word "cancelled" written beneath it. Independent of the writing of the word "cancelled" there can be no doubt but what the tearing of the first codicil, which was executed at the same time and was in fact a part of the original will, and the erasure by the testa-

tor of his signature thereto, and also the erasure by him of his signature to the second codicil, was a complete revocation of the will. * * * The case of Woodfill v. Patton, 76 Ind. 375, cited by counsel, was under a different Statute, and hence is not applicable. The same is true of the recent case of Lovell v. Quitman, 88 N. Y. 377. See Gay v. Gay, 60 Iowa, 415, which was also under a different Statute.

The learned judge writing the opinion in Evans's Appeal was clearly right in saying: "But to enable the will, codicil, or other writing to have such an effect (revocation), it must itself be complete, executed, and proved in the prescribed manner, namely, as a will. The other mode of repeal is something done to the will itself, something more than mere intention expressed. It must be intention to annul carried into execution by acts done to the paper. * * * Were there nothing more than the erasure of the last signature to the writing dated May 24, 1856, it would be difficult to escape from the conviction that it was an act of repeal annulling all that preceded that signature." In view of the additional facts which appeared, that the testator also tore the first codicil in two places and erased his signature from the second codicil, it would be impossible to come to any other conclusion than that he intended, by the acts named, to revoke both of the codicils and the whole will. These several acts being made with the intent to revoke, as there found, clearly amounted to a cancellation of the will; but when the learned judge went further, and construed the word "cancelled," written thereon, and said, "I think a repeal (a revocation of the will) is effected by the act of writing upon the will itself a word that manifests an intention to annul it," he was evidently speaking for himself, and not for the court, and as it would seem in direct violation of the rule he had just expressed himself, to the effect that there could be no revocation by mere "writing" unless it "be complete, executed, and proved in the prescribed manner, namely, as a will." Besides, such a rule would be in conflict with a previous decision in the same court. Lewis v. Lewis, supra. True, the learned judge attempts to distinguish that case by observing "that though the word was written upon the paper on which the will was written, it was placed where it could have been detached without defacing the instrument. It might have been separated and the will

itself remained intact. In this respect it differed from the case now before us." That distinguishing element, even if it were sound, would distinguish Evans's Appeal from the case before us, and make Lewis v. Lewis applicable. The learned judge who wrote that opinion was evidently led to say what he did by what was said by the judge writing the opinion in Warner v. Warner's Estate, 37 Vt. 356, where the testator wrote on the back of the very paper on which a part of the will was written, and on the second page, and just below some of the writing, so that it could not be separated from it, the words "This will is hereby cancelled and annulled in full, this 15th day of March, in the year 1859." Other words were written on the fourth page, and some erased, but the court held, in effect, that the will was cancelled by force of the above words. If that ruling were sound, the facts would distinguish the case from this; but giving the force of revocation to the words themselves, without being executed, attested, and subscribed as required by the Statute and without any tearing or burning of the paper upon which any part of the will was written, and without erasing, defacing, or obliterating any of the words of the will, or the signature of the testator or the signature of the witnesses, would seem to leave the case standing alone, with nothing to support it, and in opposition to the principles maintained in some to the best adjudicated cases. Besides, the case is condemned by one of our ablest text writers on the subject. 1 Redf. on Wills (4th ed.), 318. The difficulty with the rule contended for is that it gives to the words written in pencil, although not attested, witnessed, nor executed in the manner prescribed by the Statute, the same force as though they had been so attested, witnessed, and executed, for the purpose of proving that the act of putting the words there was with the "intention" of revoking the will. It is the language—the expression by written words alone—which is thus sought to be made effectual; whereas the Statute in effect declares that such written words shall have no force or effect as such unless executed, attested, and subscribed as required.

The argument used by the writer of the opinion in Evans's Appeal, supra, and here repeated, to the effect that the word "cancelling" in the Statute is used in the same sense as cancelling notes, bonds, or other written instruments, is plausible,

but fallacious. It is the payment, adjustment, settlement, or decree of the court which precedes the writing of the word "cancel" upon the instrument, that effects the cancellation. The word is written in such case merely as a memorandum or evidence of the previous facts which operate as a nullification. Besides, such writing is generally upon the face of the instrument itself, and not upon some remote corner of the same sheet. A will, unlike other written instruments, does not go into effect until the testator's death. The mode of making a will is definitely prescribed by Statute, and the mode of revoking a will is also definitely prescribed; and no essential part of the latter can be dispensed with any more than the former. So, a specific mode of cancellation of tax certificates, &c., fixed by Statute, furnishes no ground for holding that a will, though not included in such Statutes, may also be cancelled in the same way. Our Statute as to the mode of revoking wills came to us with its history, and the constructions which had been put upon it by the courts. In so taking it, the people of the State knew what they had obtained. To change that construction by some artificial mode of reasoning is to open the door to vagueness and uncertainty, the disastrous effects of which no one can in advance determine.

But it is claimed that such intention to revoke is sufficiently proved, without resorting to the words in pencil, by the declarations of the testatrix. It is not claimed, and there is no evidence tending to show, that any of such declarations were made at the time the words in pencil were written, but on other and different occasions. Such declarations are clearly inadmissible, because they do not constitute a part of the res gestae; besides, to allow them to have the force of evidence would be admitting testimony of one unsworn, and without the privilege of cross-examination. * * * The admission of such declarations to rebut the inference of fact arising from the absence or loss of a will is upon a different theory, as will appear from the well-written and able opinion of Judge Dyer in Southworth v. Adams, 11 Biss. 256. It has been held that where the intention to revoke had existed and been partly carried into execution, and the testator changed his mind and arrested the act of burning, tearing, cancelling, or obliterating the will before its completion, leaving the will so that its contents could still be

read, that it might nevertheless be admitted to probate. Doe v. Perkes, 3 Barn. & Ald. 489; Doe v. Harris, 6 Ad. & El. 209; Giles v. Warren, 3 Eng. (Moak), 478.

So, where there has been an attempt to alter certain portions of the will by erasure, without obliteration, and by substituting new words in their place by way of interlineation, and the writing thus altered failed to go into effect for want of re-attestation, courts have held that there was no intent to revoke, except by way of alteration, which having failed, the will remained intact as before. * * *

But without further discussion, which is already too extended, the judgment of the Circuit Court is reversed, and the cause is remanded with direction to reverse the judgment of the County Court and to direct judgment admitting the will to probate.

Ordered accordingly.

Dependent Relative Revocation.

In Re KNAPEN'S WILL.

75 Vt. 146, 53 Atl. 1003, 98 Am. St. Rep. 808. 1903.

STAFFORD, J. The testatrix made and executed her will in due form of law, and the same is still decipherable. But afterwards she attempted to make various changes therein without complying or attempting to comply with the requirements of the statute; and the question is threefold—whether the will is to be established as it was when it was executed, disregarding the attempted changes; or to be disallowed as having been wholly revoked thereby; or to be established as originally executed, except as to certain clauses, and as to those to be treated as revoked by cancellation.

The will, as executed, made some special bequests, and several money bequests, and then added a residuary clause in favor of the testatrix's two sisters, Susan Tupper and Margaret Vaux. In this clause a pen and ink line has been drawn through the name "Margaret Vaux." In the margin opposite has been written in ink the word "deceased"; and at the end of the clause have been added, also in ink, the words, "Share with Mrs. Ada Stabb." The original will was typewritten, and all the at-

tempted changes made with a pen, are, it is agreed, in the handwriting of the testatrix.

In one of the early clauses there was a bequest to the same Margaret Vaux of five hundred dollars. Here the name "Margaret" has been drawn through with a line in ink, and the word "deceased" written in the margin opposite; and to the clause have been added the words, "to be given to Mrs. Ada Vaux Stabb."

The next clause originally read as follows: "I give and bequeath to the two daughters of my said sister Margaret Vaux, Bessie and Ada, each the sum of three hundred dollars. I also give to the said Bessie and Ada, each, one-half dozen silver teaspoons. I also give to the said Ada Vaux my gold watch." The changes made are these: The name "Bessie" has been drawn through with an ink line where it first occurs and marked over with a pencil in the other place. The word "watch" has been marked over with a pencil. To the clause have been added in ink the words, "To be given to Mrs. Ada Vaux Stabb;" and these words have been marked over with a pencil.

In the next clause but one, a bequest of two hundred dollars has been changed by writing in ink the word "four" over the word "two" and by writing in the margin the word "four" and the figures "400." In the next clause the name of the legatee and the words designating the amount have been drawn through with an ink line. Other similar changes have been made. New bequests have been written in the margins, and one of these has been marked over with a pencil.

First, then, do the attempted changes constitute a revocation of the will? V. S. 2354, following the English Statute of Frauds, declares: "No will shall be revoked, except by implication of law, otherwise than by some will, codicil, or other writing, executed as provided in case of wills; or by burning, tearing, cancelling or obliterating the same, with the intention of revoking it, by the testator himself, or by some other person in his presence and by his express direction." Do the alterations amount to a revocation of the will by cancellation?

The agreed statement of facts does not say that the alterations were made with the intention of revoking the will, and, judging from the alterations themselves, there was no intention to revoke the will as a whole, but, on the contrary, an intention

to have it stand with certain changes. There is no interference with the formal parts, and no intention to revoke the whole is anywhere expressed. In these important respects the case differs from Warner v. Warner's Estate, 37 Vt. 356, 367, where the testator had written across one page of the instrument, "This will is hereby cancelled and annulled," and under the filing on the outside, "Cancelled and is null and void. I, Warner," and had erased the words, "In testimony whereof I have." We think the attempted changes in the present case cannot be said, as matter of law, to amount to a revocation of the whole will by cancellation, for although they would, if effectual, make of it a very different instrument, yet it cannot be said therefrom that the testatrix would not have left the instrument as it was in the first place, rather than have died intestate.

The interlineations of new and independent bequests are, of course, ineffectual. Neither do they invalidate the will, which was properly executed in its original form. Wheeler v. Bent, 7 Pick. (Mass.) 61; Jackson v. Holloway, 7 Johns. (N. Y.) 394.

Do any of the attempted cancellations of separate clauses constitute a revocation of the will to that extent? If we admit that in some circumstances there may be a partial revocation, we have to take note of certain complications in the present case. This will contains a residuary clause, and every cancellation of a money legacy, and probably, as this will is written, every cancellation of a specific legacy as well, works a corresponding increase in the residuary clause. Bigelow v. Gillott, 123 Mass. 102, 25 Am. Rep. 32. If there had been no residuary clause, the cancellation of a legacy would merely have left that part of the estate to be distributed as if no will had been made, and the rest of the will would operate as before; but here the cancellation gives the residuary clause a different operation. This has been held to prevent the attempted cancellation from operating as a partial revocation. Miles' Appeal, 68 Conn. 237, 36 Atl. 39, 36 L. R. A. 176.

But if we should hold otherwise upon this point, as was done in Bigelow v. Gillott, 123 Mass. 102, 25 Am. Rep. 32, we must notice a further difficulty. The testatrix has attempted to substitute a new residuary legatee in place of her deceased sister, Margaret; thus coupling the cancellation of previous bequests,

and the consequent enlargement of the residuary bequest, with the substitution of a new residuary legatee; so that it is impossible to say that she would have desired to make any of the cancellations if she had not supposed that the new residuary legatee would receive the benefit arising therefrom. In short, the alterations, when taken together, rebut the presumption of an intention to cancel any clause by itself and independently of other attempted changes and additions which are ineffectual for want of formality.

An act which might otherwise amount to a cancellation of an entire will has been held not to work that result because accompanied by other acts showing that the intention to cancel was conditional, and not absolute, as where the testator wrote upon the will the word "Cancelled," but further wrote that he intended making another will, "whereupon I shall destroy this." In re Brewster, 6 Jur. (N. S.) 56, 29 L. J. P. & D. 69; Woerner's Am. Law of Administration, § 48, with citations. So, likewise, where the testator includes an express clause of revocation in a later will, which fails to take effect through some defect therein, but not where it fails through some cause dehors the instrument. Hairston v. Hairston, 30 Miss. 276.

Jarman on Wills, vol. 1, p. 294, states the rule thus: "Where the act of cancellation or destruction is connected with the making of another will so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition, such will be the legal effect of the transaction; and therefore if the will intended to be substituted is inoperative from defect of attestation, or any other cause, the revocation fails, also, and the original will remains in force." The words "or any other cause" may give the rule too much breadth, but they may be omitted without impairing the rule for our purpose. Similarly it is said with respect to partial obliterations or cancellations that if they are made with the intention of substituting other words for those cancelled, and such intention is frustrated, there is no revocation. Woerner's Am. Law of Administration, Sec. 49; Jarman on Wills, vol. 1, p. 295, with the cases cited by both authors.

As before remarked, the agreed statement upon which this case is tried, while it says that the alterations are all in the testatrix's handwriting, does not say with what intention they

were made. Consequently we can assume only such intention as the acts necessarily imply. The intention to revoke is indispensable to a revocation, whatever the act may be; and here the acts, taken together, certainly do not imply an intention to revoke absolutely and unconditionally, but only to do so in connection with and dependently upon the making of certain other changes. The intention expressed in such further alterations and additions having been frustrated by failure to comply with the statute, it must be held that there was no revocation. The result is that all the attempted changes, being readily distinguishable and agreed upon, go for nothing; and the will must be established as it was originally executed.

Judgment reversed and cause remanded.

Revocation by Circumstances—Married Women.

DURFEE v. RISCH.

142 Mich. 504, 105 N. W. 1114, 5 L. R. A. (N. S.) 1084. 1905.

MONTGOMERY, J. On appeal from the probate court, the circuit judge directed a verdict admitting the will in question to probate. Contestant appeals.

Testatrix, while unmarried, executed the will in question. She subsequently married, and had issue, one child, who survives. The sole question is whether the will of a single woman is revoked by her subsequent marriage, followed by the birth of a child or children. Our statute of wills (section 9270, Comp. Laws), which prescribes the formalities required for the revocation of wills, provides that "nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator."

There is no doubt that at the common law the marriage of a male testator, followed by birth of issue, operated to revoke a will. This revocation was implied from the changed relations and obligations of the testator, and was based upon the presumption that had the same conditions and obligations existed at the time of the execution of the will and been taken into account, a different will (if any) would have been made. Page on Wills, Sec. 282; Woerner's Am. Law of Administration (2d

Ed.), Sec. 54. It is difficult to suggest any reason why the same implication of a revocation should not arise in case of a female testatrix. The presumption that, had the same conditions existed at the time of the execution of the will as existed later, the disposition of the estate would have been different, is certainly as strong in the case of a wife and mother as in case of a husband and father.

The proponent argues that the rule as to the revocation of the will of a female was, at the common law, that her subsequent marriage alone revoked the will; that since by statute a married woman may now make a valid will, and since it is generally held that the effect of this statute is to abrogate the rule that marriage alone (in the case of a woman) revokes the rule, it follows that there is left no common-law rule upon which a revocation of a will by a female can be predicated. This is ingenious, but not convincing. It is true that the weight of authority sustains the view that, where statutes like our Married Woman's Act (section 8690) exist, marriage of a feme sole does not of itself operate to revoke the will. * * *

The common-law rule as to the implied revocation resulting from marriage of the testatrix rested upon the ground that, after marriage, she could not make a new will, and as a will is ambulatory during the life of the testator, the continuing purpose to continue the will previously made in force could not be presumed from mere inaction on the part of one who, because of disability, could not act. Where, as in this state, the reason for this rule fails, the rule fails. It does not follow, however, because the marriage alone does not revoke the will, that marriage and birth of issue do not. The abrogation of this rule places the male and the female on the same plane as to this; i. e., that the subsequent marriage does not of itself revoke the will, but it is illogical to say, because the existence of a more restricted rule to the wills of females prevented the application of the general rule of the common law, that such rule should not be applied to make the female alike, when the removal of the latter's disability makes the general rule applicable.

As was said of a similar question in Lansing v. Haynes, 95 Mich. 16, 54 N. W. 699, 35 Am. St. Rep. 545, the common law is not so unbending as to lead to this result. "The reason of the law is the essence and soul of the law." In Noyes v. South-

worth, supra, it was said: "Our Constitution has done away with all disabilities of coverture, and expressly authorized every married woman to make wills of her estate as if she were sole. This leaves her case to be governed by the same rule which would apply to anyone else on change of condition. * * * There is no sound reason that we can perceive why, in the absence of statute, implied revocations should be extended, or should be differently treated as between men and women, when the property rights of married women have ceased to be hampered by marriage.

But it is further insisted that, as section 9285 makes provision for a child born after the making of his father's will, the rule that marriage and birth of a child revokes a will previously made by the father is abrogated. It is contended that this provision applies only to a man's will, and it was so held in Cotheal v. Cotheal, 40 N. Y. 405; but it is at the same time urged that, inasmuch as the rule as applied to a woman's will is applied by analogy, it follows that if the statutes have abrogated the rule as to men it follows that the rule as to women has no existence. This contention does not take account of the fact that we are to apply a principle of the common law, and that principle is not affected by the withdrawal of a class of persons from those to be affected by its operation. We regard this principle of the common law as controlling, and hold that the marriage of the testatrix and subsequent birth of a child to her resulted in a revocation by operation of law.

The judgment is reversed, and a new trial ordered.

CHAPTER IX.

REPUBLICATION AND REVIVAL.

Revival.

STETSON v. STETSON.

200 Ill. 601-607. 1903.

MAGRUDER, C. J., delivered the opinion of the court:

In the case at bar, Jesse Stetson died testate on April 27, 1899, leaving a will, dated December 3, 1897, and executed by him on that day in accordance with the statutes in such cases made and provided. This will was found after his death uncanceled and among his papers in the Citizens' National Bank of Princeton in Bureau county, with which bank the deceased was in the habit of doing business in his lifetime. The will, when found in the bank, was in an envelope, which was sealed. After the death of the testator it was taken by the president of the bank to the judge of the county court, where the envelope was opened, and the will was filed. It was duly admitted to probate on June 5, 1899; and the present bill in chancery to set aside the probate thereof was filed May 2, 1901, about a month before the expiration of the two years, allowed by the statute for filing a bill in chancery to contest the validity of the same.

The sole ground, upon which the validity of the will of December 3, 1897, duly admitted to probate, is contested, is that a subsequent will was executed by the testator, containing a clause revoking all former wills. Such subsequent will, alleged to have been executed between September 1, 1898, and the death of the testator, has been lost or destroyed; or, at any rate, it was not found in the possession of the testator, and has never been produced, either for probate in the county court, or otherwise.

The question, presented for our consideration, and raised by the refusal of the court below to hold as law the propositions submitted by the appellants, and by the rulings of the court below in the admission and exclusion of evidence, is two-

fold in its character, and, as formulated in the briefs of counsel on both sides, may be thus stated: If the second will, made by Jesse Stetson, contained an express clause of revocation, did such clause operate at once and of its own force to immediately revoke and annul the first will, made on December 3, 1897; and did the loss or destruction of the second will, containing such clause of revocation, even though such loss or destruction was the act of the testator himself, operate to revive the former will dated December 3, 1897?

Perhaps, in no branch of the law is there more conflict among the decisions of the courts than in that, which relates to the revocation of a former will by a subsequent will, and to the effect of the cancellation of a subsequent revoking will in reference to the revival or non-revival thereby of the first will.

There are cases, which hold, and many of the text books endorse and sustain the holdings of such cases, that, where a person, having made a will, afterwards makes another will, containing a clause expressly revoking all former wills, and afterwards destroys the second will, and dies, leaving the former will uncanceled, the revoking clause operates instantaneously to effect a revocation, and that, consequently, the destruction of the second will not revive the former one. * * * Many of the cases, which thus hold that the loss or destruction by the testator himself of a subsequent will, containing a revoking clause, does not revive a former will, though found in the possession of the testator uncanceled at his death, are based upon statutes dissimilar to the Illinois statute upon this subject, and upon the considerations which have no force or application in this State, and under our decisions.

In England, what is known as the Statute of Victoria, passed in 1837, provided (chap. 26, sec. 22), that "no will or codicil or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same," etc. (29 Am. & Eng. Ency. of Law, p. 289, note 2). Some thirteen of the American States have adopted either the Statute of Victoria, or a similar statute, upon this subject. But no such statute was ever passed or adopted in this State.

In some of the cases a distinction is drawn between a subse-

quent will, whose provisions are inconsistent with the former will, thereby operating to effect a revocation by implication, and a subsequent will, which contains a clause expressly revoking all former wills. This distinction, however, is done away with under the terms of the Illinois statute. Section 17 of the Illinois Statute of Wills provides as follows: "No will, testament or codicil shall be revoked, otherwise than by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence, by his direction and consent, or by some other will, testament or codicil in writing, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid, in due form of law." 3 Starr & Curt. Ann. Stat., 2d ed., pp. 4044, 4045. By the terms of this statute, the subsequent will, which shall have the effect of revoking a former will, must be a will "declaring the same"; that is to say, must be a will, which, upon its face and by its terms, declares a revocation. If the will must expressly contain a clause revoking all former wills, the question as to any inconsistency between the provisions of the later will and the former will is immaterial.

Again, many of the cases are based upon statutes, which authorize the revocation of a will to be made by a subsequent writing, which is not necessarily a will, or testamentary in its character. A large part of the American legislation upon this subject has its basis in the English Statute of Frauds, by one of the provisions of which, "no devise in writing of lands, tenements or hereditaments, nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same," etc. 1 Underhill on Wills, sec. 247. It will be noticed that, by the terms of this statute, a devise in writing of lands, etc., may be revoked, not only by some other will or codicil in writing, but by some "other writing declaring the same." In other words, the writing, declaring the revocation, may be some other writing than a will or codicil. Where the instrument of revocation is not necessarily, by the terms of the statute, a will, it may have the effect of operating instantaneously, so as to effect a revocation before the death of the testator; and if the instrument of revocation may be in writing, it will make no difference that its terms are

embodied in a will rather than in some other writing, which is not a will.

For example, one of the cases, relied upon by counsel for appellants to support their contention upon this subject, is the case of In re Cunningham, 38 Minn. 169, where the court say: "The testator might effectually revoke his former will by a writing so declaring, and executed as this instrument was executed, Gen. Stat. 1878, chap. 47, sec. 9, as he might also by other means." By reference to section 9 of chapter 47 of the General Statutes of Minnesota of 1878, it is found that a will may be revoked "by some will, codicil or other writing signed, attested and subscribed in the manner provided for the execution of a will." By section 17, however, of the Illinois Statute of Wills, the revocation must be by a will declaring such revocation, and not by some other writing than a will, which may not be testamentary in its character.

So, also, in Cheever v. North, 106 Mich. 393, it appears that, by the terms of the Michigan statute, a former will may be revoked not only by a subsequent will, but "by some other writing signed, attested and subscribed in the manner provided in this chapter for the execution of a will." The case of Scott v. Fink, 45 Mich. 241, is based largely upon the case of James v. Marvin, 3 Conn. 576; but the latter case of James v. Marvin has been materially weakened, if not actually overruled, by the subsequent case of Peck's Appeal from Probate, 50 Conn. 562. In Peck's Appeal from Probate, supra, the criticism of James v. Martin, supra, made by Redfield in his work on Wills, is referred to and quoted; and, there, the Supreme Court of Connecticut say: "The weight of authority seems to be in harmony with the views expressed by Mr. Redfield. * * * The testatrix by executing the second will evinced no intention to become intestate, but rather a contrary intention. By destroying the last will and carefully preserving the first she affords satisfactory evidence that she intended until the very last to die testate, and that that should be her will. In the absence of an express provision to that effect we cannot presume that the legislature intended that the mere execution of a will should in all cases revoke a prior will. Such a construction would in many cases defeat the manifest intention of the testator. The statute requires a 'later will or codicil.' We think that means

an operative will or codicil. * * * We would say, however, that we have carefully examined the cases cited by the counsel for the appellees, and find that many of them are cases in which the later wills became operative as wills; and of course the language of the courts must be interpreted with reference to that circumstance, and cannot properly be applied to a case like this."

So, also, in the case of Barksdale v. Hopkins, 23 Ga. 340, it appears that under the statute of Georgia a will may be revoked "by some other will or codicil in writing, or other writing of the devisor signed in the presence of three or four witnesses declaring the same." Under the Georgia statute, not only may the revocation be by an instrument not testamentary in its character, but Georgia is one of the States which has adopted the Victoria statute, or a statute similar to the Victoria statute above quoted. In Virginia, also, section 22 of the Statute of Victoria, 1837, is in force. Rudisill's Exr. v. Rodes, 29 Gratt. 148. In Texas, also, where the doctrine seems to prevail that the destruction of a duly executed will, containing an express revocation of a former will, does not have the effect of reviving the former will, the statute provides that a will may be revoked "by subsequent will, codicil, or declaration in writing executed with like formalities," etc. Hawes v. Nicholas, 72 Tex. 483.

It being established then that, under section 17 of the Illinois Statute of Wills, a former will can only be revoked by a subsequent will declaring the revocation of all former wills, and not by a subsequent instrument in writing not testamentary in character which declared the revocation of the former will, it cannot be said that, in this State, the destruction of a duly executed will, containing an express revocation of a former will, does not have the effect of reviving the former will.

We have held that "a will takes effect at the death of the testator." Scofield v. Olcott, 120 Ill. 362. Indeed, the general doctrine is, that a will is ambulatory, and has no effect until the death of the testator. It follows, that a testamentary paper, which the testator permits to survive him, must be his will. A will is inoperative and ineffectual, and has no legal existence, until it is consummated by death. Taylor v. Taylor, 2 N. & M. (S. C.) 483.

In Marsh v. Marsh, 3 Jones' L. (48 N. C. 78) it is well said: "As wills are ambulatory and have no operation until the death of the testator, it is difficult to see how the execution of a second will, which is afterwards destroyed by the testator, can in anywise affect the validity of the will previously executed. Both are inactive during the life of the testator, and the cancellation of the second, it would seem, must necessarily leave the first to go into operation at the testator's death. Nor is it perceived how the fact, that the second contained a clause of revocation, can alter the case; because that clause is just as inactive and inoperative as the rest of it, and so continues up to the time that the whole is canceled. This principle is settled in the common law courts in England, in regard to devises." In Taylor v. Pegram, 151 Ill. 106, we said: "As a general rule, if a will is traced into the testator's possession, and, at his death, cannot be found, the presumption is, (in the absence of circumstances tending to show a contrary conclusion,) that he destroyed it *animo revocandi.*" "Where a testator has a will in his own custody, and that will cannot be found after his death, the presumption is that he has destroyed it himself—it cannot be presumed that the destruction has taken place by any other person without his knowledge or authority, for that would be presuming a crime." Rickards v. Mumford, 2 Ph. 24; 29 Am. & Eng. Ency. of Law, p. 292, note 3. See also Boyle v. Boyle, 158 Ill. 228. In Boyle v. Boyle, supra, it was held that a will will be presumed to have been destroyed by the testator himself, or at his direction, where he took it from the custodian with whom it had been for several months, and carried it away, and it could not be found after his death.

In the case at bar, the will, which is said to have been executed by Jesse Stetson between September 1, 1898, and his death on April 27, 1899, is shown by the testimony of the appellants to have been taken possession of by him as soon as it was executed, and to have been carried away by him from the office of the attorney, who is said to have drawn it; nor could it be found among his papers or elsewhere after his death. It is to be presumed, therefore, that Jesse Stetson destroyed this will *animo revocandi.* If he destroyed it with the intention of canceling or revoking it, it was canceled or revoked as an entirety; so long as Jesse Stetson was alive, this second will was

merely ambulatory, and had no operation, and could have no operation until his death. While it was thus ambulatory, and before his death, the presumption is that he destroyed it, and if he destroyed it, the clause contained in it, which revoked all former wills, was canceled and revoked, as well as the balance of the will. It necessarily results that the former will of December 3, 1897, was revived when the subsequent will, containing the revoking clause, was canceled or destroyed. Upon this subject Redfield in his work on Wills (1 Redfield on the Law of Wills, marg. p. 328) says: "It has been held in some of the American courts, that a subsequent will containing a clause of revocation, executed with due solemnity for the purpose of revoking an existing will, operates, *proprio vigore,* and instantaneously, as a revocation, and consequently, that the destruction of the second will did not revive the former one. This doctrine has an air of plausibility, from the fact that an instrument of revocation alone would unquestionably have this effect, so long as it was allowed to remain operative. But that would show a present purpose of becoming intestate, carried into effect as far as practicable before death. But the making of a will, with a revocatory clause, is very different. It is but substituting one will for another. And the revocatory clause is made dependent, in some sense, upon the subsequent will going into operation. And there is, ordinarily, no purpose of having the revocatory clause operate, except upon that condition. The whole instrument is, therefore, ambulatory, and when destroyed it all ceases to have any operation. And the same is true of the destruction of a will merely revocatory of former wills. By such destruction, the former wills, if in existence, become revived." Peck's Appeal from Probate, 50 Conn. 566.

In Flintham v. Bradford, 10 Pa. St. 90, the Supreme Court of Pennsylvania say: "All wills are in their nature inchoate and ambulatory until testator's death, at which time, and not before, the testament becomes operative and complete. The will of 1824 was an inchoate intention, mutable and inconstant, and, by the willful and deliberate act of cancellation on the part of the testator, it became as if it never had been. The prior will of 1821, being preserved by the testator entire, and without intentional or apparent blemish, became the will for the time being, which should be consummated at the testator's

death, unless before that time he manifested a change of intention, according to the rules of law." So, in the case at bar, the second will, alleged to have been made by Jesse Stetson, was inchoate and ambulatory until his death; and, as he is presumed to have destroyed it for the reasons already stated, "it became as if it never had been." The prior will of December 3, 1897, having been preserved by him entire and without intentional or apparent blemish, has become his will.

At common law, where the later of two inconsistent wills was revoked by the testator in his lifetime, the earlier will became thereby revived, "and, unless afterwards revoked by some subsequent act, came into operation on his decease, whether the later will contained an express clause of revocation or not." 29 Am. & Eng. Ency. of Law, p. 288. In Harwood v. Goodright, Cowp. 92, Lord Mansfield said: "If a testator makes one will and does not destroy it, though he makes another at any time virtually or expressly revoking the former, if he afterwards destroy the revocation, the first will is still in force and good." 29 Am. & Eng. Ency. of Law, p. 289, note 3.

In Goodright v. Glazier, 4 Burr, 2513, Lord Mansfield said: "Here, the intention of the testator is plain and clear. A will is ambulatory till the death of the testator. If the testator lets it stand till he dies, it is his will; if he does not suffer it to do so, it is not his will. Here, he had two. He has canceled the second; it has no effect, no operation; it is as no will at all, being canceled before his death. But the former, which was never canceled, stands as his will." In the same case Mr. Justice Yates concurred with Lord Mansfield and said: "A will has no operation till the death of the testator. This second will never operated; it was only intentional. The testator changed his intention; and canceled it. If by making the second the testator intended to revoke the former, yet that revocation was itself revocable; and he has revoked it."

In Schouler on Wills (3d ed., sec. 413) it is said: "The English common law tribunals laid down a rule, under Lord Mansfield's lead, which has been thought more inflexible than that favored by ecclesiastical courts, viz., to the effect, that, if a testator keeps his first will undestroyed and uncanceled, makes a second will virtually or expressly revoking it, and then destroys or cancels the second will only, thus repealing his revo-

cation, the first will thereupon revives and continues in force." "In the ecclesiastical courts it was held that the revocation of the later will raised no presumption in favor of the revival of the earlier will, but that the question depended upon the intention of the testator, as shown by the peculiar facts and circumstances of the case, and was open to decision either way." 29 Am. & Eng. Ency. of Law, pp. 288, 289.

But "by the common law the first will is presumed to be restored to its active energy by the canceling of the second." Taylor v. Taylor, supra. The common law rule best harmonizes with the course of legislation and judicial decisions in this State, for the reason that the common law of England, so far as the same is applicable and of a general nature, is considered as of full force in this State where it is not repealed by legislative authority. Hurd's Stat. 1899, p. 399. The rule above stated, as adopted by the ecclesiastical courts, is derived from the civil, and not the common law. Taylor v. Taylor, supra. In Randall v. Beatty, 31 N. J. Eq. 643, where a testatrix executed several wills, all of which she destroyed, except one executed in 1870, and where by a will made in 1873 she expressly revoked all former wills, but afterwards canceled the will of 1873, and where after her death the will of 1870 was found carefully preserved among her effects, it was held that the cancellation of the will of 1873 revived that of 1870, the court saying: "The rule on the subject of the revival of a prior will by the revocation of a later one containing words of revocation was, up to 1838 (when by the enactment of a statute—1 Vict., chap. 26—the question was put at rest), different in the courts of common law and the ecclesiastical courts in England, the former holding that the revocation of the later will, of itself, worked a revival (Jarman on Wills, 122, 123), while the latter held that, whether there was a revival or not, was a question of intention. Usticke v. Bawden, 2 Addams, 116. The will of 1870 was never canceled. * * * The will of 1870 was, at her death, found among her effects in an envelope, with a copy of her deceased husband's will. It was entirely in her own handwriting. The law declares the manner in which a will is to be revoked. It must be by burning, canceling, tearing or obliterating it by the testator, or in his presence and by his direction and consent, or by a writing executed with the same formalities as a will.

No proof of declarations of revocation, made by the testator, will avail. * * * The will of 1870 is produced uncanceled. It is admitted that there is no revocatory will or writing extant, but it is alleged, that all such instruments subsequently made by the testatrix, have been canceled. The execution of the will of 1873 was not attended or followed by the cancellation of the will of 1870. Notwithstanding the revocatory clause in the will of 1873, the will of 1870 was retained by the testatrix uncanceled up to the day of her death. The fact, that she so kept the will, is the most cogent evidence of her intention that it should be revived by the cancellation of the will of 1873. * * * The true rule on the subject is, that, where one will is revoked by another, the revocation is testamentary, and the revocation of the latter will revives the former."

In Lawson v. Morrison, 2 Dal. 289, it was said: "It has been often determined that a will revoked by a subsequent will, but not cancelled, was re-established by the cancellation of the subsequent will."

Our conclusion is that, inasmuch as the later will executed by the testator, Jesse Stetson, must be presumed to have been destroyed by him in his lifetime, this loss or destruction has operated as a revival of the former will of December 3, 1897, although the later will contained a revocatory clause. For this reason the court below committed no error in dismissing the bill of the complainants. * * *

The decree of the circuit court is affirmed.

Decree affirmed.

PART III

PROBATE OF WILLS AND ADMINISTRATION OF ESTATES

DIVISION I

DECEDENTS' ESTATES

CHAPTER XII.

IN GENERAL.

Probate.

RICHARDS v. PIERCE.

44 Mich. 444, 7 N. W. 54. 1880.

CAMPBELL, J. Plaintiff brought ejectment for certain lands in Shiawasse county, which belonged to James Wadsworth, of Livingston county, New York, and were devised by his last will to various persons, from whom plaintiff derives title. These devises were partly in trust and partly directly, in the same proportions and for the same beneficiaries as would have taken the property by descent. The testator died in 1844 and his will was proved the same year in New York, but was not proved in Michigan until after this action was brought.

The only question argued before us was whether, before probate, ejectment could be brought by devisees or by those to whom their rights had been previously transferred. The general direction given by the court below to find a verdict for the defendant must have been given under misapprehension, as title was made out which would have been valid without a will, to a large share of the estate. But this seems to have escaped the notice of all parties, and is not material as the case stands.

There has never been any question of the right of a devisee to take his estate as of the death of the testator, and our statutes confine descents, and did when this testator died, to property which is not devised. Rev. St. 1838, p. 267. That this is so for all purposes except as otherwise provided by statute is not doubted. But it is claimed that the declaration of section 30, p. 275, Rev. St. 1838 (which is substantially the same as in subsequent revisions), that "no will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the probate court," makes every devise take effect from probate and not earlier, and if not for other purposes, does so for purposes of bringing action. As probate was always necessary to enable one to make proof of title of personalty, this statute cannot certainly impose any greater restrictions on realty than existed before on personalty.

There were undoubtedly some technical rules of common-law pleading which required an executor to make profert of his letters in pleading. But for any other purpose the decisions are uniform that probate merely furnished the means of establishing by a peculiar kind of record evidence the validity of an existing right; and that for every valuable purpose touching the existence and transfer of title the probate was retroactive, and had the same effect as if it had been had at the time of the testator's death. And so far as the statutes have been applied to devises, there is no material difference. Upon so familiar a rule it would not be profitable to multiply authorities, and a few illustrations will suffice as to the condition of things before probate.

The executor may release a cause of action. * * * He may sell goods. Mayor of Norwich v. Johnson, 3 Mod. 92. He may enter on a term and the entry be good though he die before probate. 3 Dyer, 367. He may sell a term of years, though he die before probate, and the sale will stand. Brazier v. Hudson, 8 Simons, 67.

In Wankford v. Wankford, 1 Salk. 299 and notes, the doctrine is quite fully discussed, and clearly laid down. And the practical result is said in Brazier v. Hudson to be that subsequent probate validates all acts that would be valid after. This may be a somewhat broad statement, but it is certainly true for most purposes, and authorities might be multiplied upon it.

In the United States the rule has been the same. After probate a conveyance previous thereto by a devisee has been held valid. Spring v. Parkman, 3 Fairf. 127. And in DeWolf v. Brown, 15 Pick. 462, it was held the estate devised vested immediately both as to realty and personalty on the death of testator, so as to authorize suit for a taking of property connected with a farm before probate. The action then was after probate. Both these cases were under statutes like ours.

We have ourselves passed upon the question as to the immediate interest of a legatee in a mortgage which formed part of an estate in realty and personalty willed to her. In Sutphen v. Ellis, 35 Mich. 446, we held that an assignment of the mortgage made by the legatee who died before the will was proved, was valid. As already suggested, our statute puts realty and personalty on the same footing as to the necessity of probate.

In 3 Redfield on Wills, 23, a similar doctrine is laid down, but it is suggested there as well as in some other authorities that no action will lie before probate, and this seems to be asserted on an idea that in law no action accrues any earlier. We think this a misapprehension. The common-law authorities upon pleading require profert to be made in the declaration, and for this reason it is often said probate must then have been taken out. But we do not find any doctrine requiring probate before action brought, but only before declaring. In 1 Salk. 302, 303, before referred to, it is said that an action may be brought before Probate, but plaintiff cannot declare. Several authorities are collected in Comyn's Dig. "Administration," B, 9, to the effect that an action brought before probate is made good by subsequent probate, "for it is sufficient if the probate appears upon the declaration."

In Thompson v. Reynolds, 7 B. & C. 123, the true doctrine was more distinctly explained. In that case upon an issue made by plea and replication whether the plaintiff was executor in manner and form as averred in his declaration, in which he actually made profert of his letters, he was allowed to recover, although the proof showed the letters were not granted until some months after the declaration was filed. In equity also it has been held that proof of probate before the hearing is

sufficient, although occurring during the litigation. Humphreys v. Humphreys, 3 P. Wms. 349. And see Comber's Case, 1 P. Wms. 768.

It appears that the only objection that has been urged does not really go to the right of action, but only to the formalities of pleading; and that this forms no exception to the rule that the probate relates back. As under our forms of pleading the plaintiff in ejectment is not bound to aver the character of his title except as to its extent, there is no room for the formal objection, which has never even in personal actions been allowed to prevail if the party chose to make proper allegations, whether true or false.

We think the plaintiff had a right to bring his suit. The judgment must be reversed with costs and a new trial granted.

CHAPTER XIII.

ADMINISTRATION.

BROWN v. BAXTER ET AL.

77 Kan. 97, 94 Pac. 155. 1908.

GRAVES, J. Three assignments of error have been made: (1) The plaintiff is not the owner of the note and mortgage or the real party in interest. (2) The cause of action is barred by the statute of limitations. (3) The court erred in the admission of evidence. * * *

It is insisted that, when a citizen of the State of Ohio dies, the title to his personal property descends to his executor or administrator, and not to his heirs, and therefore the ownership of the note and mortgage involved in this action did not pass to M. J. Buchanan, or John Buchanan, deceased. Assuming, as we must in the absence of evidence to the contrary, that the law of the State of Ohio upon the subject is the same as it is in this State, we do not concur in this view.

Under §§ 1-32 of the law relating to descents and distributions, being chapter 33, Gen. St. 1901, the equitable title to the whole estate belonging to a decedent, real and personal, not exempt, descends directly to his heirs. The legal title to personal property passes to the administrator, if there be one, who holds it in trust for creditors, heirs, or legatees. Fletcher v. Wormington, 24 Kan. 264. When there are no debts, administration is unnecessary, and the heirs may collect the estate and make distribution among themselves. See 3 Redfield on Wills, p. 89; 17 Am. & Eng. Ency. of Law (2d Ed.) 742, where it is said: "If there are no creditors, the next of kin entitled to the estate may collect and make distribution among themselves without administration, but the court of probate still has jurisdiction to grant administration, though the estate owes no debts, and there is only one distributee." See, also, 18 Cyc. 62, where it is said: "In a number of states it is held

that administration is unnecessary where there are no debts of the estate or the debts have all been paid; the courts considering that when the only duty devolving on an administration would be to make a distribution of the estate, and the heirs or distributees make or are able to make a satisfactory distribution or disposition thereof themselves, or there is only one heir, administration would be merely a useless ceremony involving unnecessary expense, and the same is true where no administration has been applied for, and the claims of creditors, if any exist, are barred because they have not been presented to the probate court within the time limited for that purpose, or by the statute of limitations. But, if any of the heirs or distributees demand an administration, it must be had."

In the case of Foote v. Foote, 61 Mich 181, 28 N. W. 90, the court said: "The legal estate only in personal property vests in the administrators. The equitable estate therein is in the heirs, or other persons entitled to distributive portions thereof. The estate of the administrators therein is a trust for that purpose, and is created only for the purpose of laying hold of the estate and making such distribution. When there are no creditors, the heirs or legatees may collect, if they can, the estate together, and make such distribution among themselves as they may agree to and carry into effect, without the intervention of any administrators; and the law favors such arrangements. In such cases it is only where the heirs or legatees fail to make such collection and distribution that administration becomes necessary. When such arrangement and distribution have been made and executed, it will be binding, both in law and equity, as between the parties making it, whenever the rights of creditors do not intervene. And, where there are no creditors, the heirs or legatees may divide up and distribute the personal property of the decedent, without converting it into money, in such manner as they see fit; and, when such division has been executed, even though it is not such as the decedent has made by his will, or such as the law would make when there is no will, it will be binding upon all the parties to the agreement."

In the case of Walworth v. Abel, 52 Pa. 372, it is said: "No doubt the personal estate of a decedent vests in the administrator; but in trust for creditors and heirs or legatees. The

mere legal estate passes to the administrator. The equitable descends upon the parties entitled to distribution. If there be no creditors, the heirs have a complete equity in the property, and, if they choose, instead of taking letters of administration, to distribute it by arrangement made and executed amongst themselves, where is the principle which forbids it? The parties to such an arrangement executed would be forever equitably estopped from disturbing it, as amongst themselves, upon the most familiar principles of justice. And why shall the arrangement be broken up by a mere intermeddler? Family arrangements are favorites of the law, and when fairly made are never allowed to be disturbed by the parties, or any other for them." * * *

In this case there were no debts, except a few of small amount, which were paid. The assets were accessible to the heirs of the intestate, who lived where they could easily confer with each other. The appointment of an administrator was unnecessary, and the expenses incident thereto might well be avoided. The property belonged to the heirs exclusively, and it seems reasonable and just that they should have the right to divide it among themselves, and own, use, and dispose of it in severalty as any other property which they might own. The only person who could question such a transaction would be a creditor who had been overlooked and not paid. The possibility of that contingency had passed, however, some years before this action was commenced by lapse of time; more than three years having passed since the last date at which an administrator might have been appointed. * * *

The widow and each of the children of John Buchanan, deceased, testified at the trial to the settlement and division of the estate among themselves and the grandchildren of the deceased, and that it was satisfactory to all parties. The great lapse of time since the estate was settled, during which all parties have acquiesced therein and retained the amount received thereby is sufficient to estop them from hereafter objecting to the arrangement. The claim of the plaintiff in error that the note and mortgage are barred by the statute of limitations is placed upon the ground that Mary J. Buchanan did not become the owner thereof by the action of the heirs of John Buchanan, deceased, and therefore the payment of inter-

est to her did not prevent the running of the statute. The view we have taken of her rights in this respect, however, answers this objection, and the question need not be further considered.

This disposes of the assignments of error. No material error having been shown, the judgment is affirmed.

Jurisdiction.

SCOTT v. McNEAL ET AL.

154 U. S. 34. 1894.

In error to the Supreme Court of the State of Washington.

This was an action of ejectment, brought January 14, 1892, in the Superior Court of Thurston County in the State of Washington, by Moses H. Scott against John McNeal and Augustine McNeal to recover possession of a tract of land in that county.

At the trial, it was conceded that the title in this land was in the plaintiff until 1888; and he testified that he entered into possession thereof, and made improvements thereon, and had never parted with the possession, nor authorized anyone to go upon the land; that he had demanded possession of the defendants, and they had withheld it from him; and that its rental value was $100 a year.

The defendants denied the plaintiff's title, and claimed title in themselves under a deed from an administrator of the plaintiff's estate, appointed in April, 1888; and in their answer alleged that in March, 1881, the plaintiff mysteriously disappeared from his place of abode, and without the knowledge of those with whom he had been accustomed to associate, and remained continuously away until July, 1891, and was generally believed by his former associates to be dead; and specifically alleged, and at the trial offered evidence tending to prove, the following facts:

On April 2, 1888, Mary Scott presented to the Probate Court of the County of Thurston, in the Territory of Washington, a petition for the appointment of R. H. Milroy as administrator of the estate of the plaintiff, alleging "that one Moses H. Scott, heretofore a resident of the above-named county and territory,

mysteriously disappeared some time during the month of March, 1881, and more than seven years ago; that careful inquiry made by relatives and friends of said Moses H. Scott, at different times since his said disappearance, has failed to give any trace or information of his whereabouts, or any evidence that he is still living; that your petitioner verily believes that said Moses H. Scott is dead, and has been dead from the time of his said disappearance;" that he was never married, and left no last will or testament yet heard of; that he left real estate in his own right in this county of the value of $600, more or less; that his heirs were three minor children of a deceased brother; and that the petitioner was a judgment creditor of Scott.

Notice of that petition was given by posting in three public places, as required by law, a notice, dated April 7, 1888, signed by the probate judge, and in these words: "In the Probate Court of Thurston County, W. T. Mary Scott having filed in this court a petition praying for the appointment of R. H. Milroy as administrator of the estate of Moses H. Scott, notice is hereby given that the hearing and consideration of said petition has been fixed for Friday, April 20, 1888, at 10 o'clock a. m., at the office of the undersigned."

At the time thus appointed, the probate court, after appointing a guardian ad litem for said minors, and hearing witnesses, made an order by which, "it duly appearing that said Moses H. Scott disappeared over seven years ago, and that since said time nothing has been heard or known of him by his relatives and acquaintances, and that said relatives and acquaintances believe him to be dead; and that his surroundings, when last seen (about eight years ago), and the circumstances of that time and immediately and shortly afterwards, were such as to give his relatives and acquaintances the belief that he was murdered at about that time; and it appearing that he has estate in this county: Now, therefore, the court find that the said Moses H. Scott is dead to all legal intents and purposes, having died on or about March 25, 1888; and no objections having been filed or made to the said petition of Mary Scott, and the guardian ad litem of the minor heirs herein consenting, it is ordered that said R. H. Milroy be appointed administrator of said estate, and that letters of guardianship issue to him upon his filing a good and sufficient bond in the sum of one thousand

dollars." Letters of administration were issued to Milroy, and he gave bond accordingly.

On July 16, 1888, the probate court, on the petition of Milroy as administrator, and after the usual notice, and with the consent of the guardian ad litem of said minors, made an order, authorizing Milroy as administrator to sell all Scott's real estate. Pursuant to this order, he sold by public auction the land now in question, for the price of $301.50, to Samuel C. Ward. On November 26, 1888, the probate court confirmed the sale, the land was conveyed to Ward, and the purchase money was received by Milroy, and was afterwards applied by him to the payment of a debt of Scott, secured by mortgage of the land.

On November 26, 1889, Ward conveyed this land by warranty deed to the defendants, for a consideration paid of $800; and the defendants forthwith took and since retained possession of the land, and made valuable improvements thereon.

At the time of the offer of this evidence, the plaintiff objected to the admission of the proceedings in the probate court, upon the ground that they were absolutely void, because no administration on the estate of a live man could be valid, and the probate court had no jurisdiction to make the orders in question; and objected to the rest of the evidence as irrelevant and immaterial. But the court ruled that, the probate court having passed upon the sufficiency of the petition to give it jurisdiction, and having found that the law presumed Scott to be dead, its proceedings were not absolutely void; and therefore admitted the evidence objected to, and directed a verdict for the defendants, which was returned by the jury, and judgment rendered thereon. The plaintiff duly excepted to the rulings and instructions at the trial, and appealed to the Supreme Court of the state.

In that court, it was argued in his behalf "that to give effect to the probate proceedings under the circumstances would be to deprive him of his property without due process of law." But the court held the proceedings of the probate court to be valid, and therefore affirmed the judgment. 5 Wash. 309, 31 Pac. 873.

The plaintiff sued out this writ of error, and assigned for error that the probate proceedings, as regarded him and his estate, were without jurisdiction over the subject-matter, and

absolutely void; and that the judgment of the superior court of the state affirming that judgment, deprived him of his property without due process of law, and were contrary to the fourteenth amendment of the constitution of the United States.

GRAY, J., after stating the case, delivered the opinion of the court.

The plaintiff formerly owned the land in question, and still owns it, unless he has been deprived of it by a sale and conveyance, under order of the Probate Court of the County of Thurston and Territory of Washington, by an administrator of his estate, appointed by that court on April 20, upon a petition filed April 2, 1888.

The form of the order appointing the administrator is peculiar. By that order, after reciting that the plaintiff disappeared more than seven years before, and had not since been seen or heard of by his relatives and acquaintances, and that the circumstances at and immediately after the time when he was last seen, about eight years ago, were such as to give them the belief that he was murdered about that time, the probate court finds that he "is dead to all legal intents and purposes, having died on or about March 25, 1888"; that is to say, not at the time of his supposed murder, seven or eight years before, but within a month before the filing of the petition for administration. The order also, after directing that Milroy be appointed administrator, purports to direct that "letters of guardianship" issue to him upon his giving bond; but this was evidently a clerical error in the order or in the record, for it appears that he received letters of administration and qualified under them.

The fundamental question in the case is whether letters of administration upon the estate of a person who is in fact alive have any validity or effect as against him.

By the law of England and America, before the Declaration of Independence, and for almost a century afterwards, the absolute nullity of such letters was treated as beyond dispute.

In Allen v. Dundas, 3 Term R. 125, in 1789, in which the court of king's bench held that payment of a debt due to a deceased person to an executor who had obtained probate of a forged will discharged the debtor, notwithstanding the probate was afterwards declared null and void, and administration

granted to the next in kin, the decision went upon the ground that the probate, being a judicial act of the ecclesiastical court within its jurisdiction, could not, so long as it remained unrepealed, be impeached in the temporal courts. It was argued for the plaintiff that the case stood as if the creditor had not been dead, and had himself brought the action, in which case it was assumed, on all hands, that payment to an executor would be no defense. But the court clearly stated the essential distinction between the two cases. Mr. Justice Ashurst said: "The case of a probate of a supposed will during the life of the party may be distinguished from the present, because during his life the ecclesiastical court has no jurisdiction, nor can they inquire who is his representative; but, when the party is dead, it is within their jurisdiction." And Mr. Justice Buller said: "Then this case was compared to a probate of a supposed will of a living person; but in such a case the ecclesiastical court have no jurisdiction, and the probate can have no effect; their jurisdiction is only to grant probates of the wills of dead persons. The distinction in this respect is this: If they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places; but where they have no jurisdiction, their whole proceedings are a nullity." Id. 130. And such is the law of England to this day. Williams, Ex'rs (9th ed.), 478, 1795; Taylor, Ev. (8th ed.) §§ 1677, 1714.

In Griffith v. Frazier, 8 Cranch, 9, 23, in 1814, this court, in speaking by Chief Justice Marshall, said: "To give the ordinary jurisdiction, a case in which, by law, letters of administration may issue, must be brought before him. In the common case of intestacy, it is clear that letters of administration must be granted to some person by the ordinary; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority, because he had power to grant letters of administration in the case. But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person, whose estate is to be committed to the care of others, be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be

otherwise, does not invest the person he may appoint with the character of powers of an administrator. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by law. And although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction." See also Insurance Co. v. Tisdale, 91 U. S. 238, 243; Hegler v. Faulkner, 153 U. S. 109, 118, 14 Sup. Ct. 779.

The same doctrine has been affirmed by the Supreme Court of Pennsylvania in a series of cases beginning 70 years ago. McPherson v. Cunliff (1824) 11 Serg. & R. 422, 430; Peebles' Appeal (1826) 15 Serg. & R. 39, 42; Devlin v. Com. (1882) 101 Pa. St. 273. In the last of those cases, it was held that a grant of letters of administration upon the estate of a person who, having been absent and unheard from for 15 years, was presumed to be dead, but who, as it afterwards appeared, was in fact alive, was absolutely void, and might be impeached collaterally.

The Supreme Judicial Court of Massachusetts, in 1861, upon full consideration, held that an appointment of an administrator of a man who was in fact alive, but had been absent and not heard from for more than seven years, was void, and that payment to such an administrator was no bar to an action brought by the man on his return; and, in answer to the suggestion of counsel, that "seven years' absence, upon leaving one's usual home or place of business, without being heard of, authorizes the judge of probate to treat the case as though the party were dead," the court said: "The error consists in this, that those facts are only presumptive evidence of death, and may always be controlled by other evidence showing that the fact was otherwise. The only jurisdiction is over the estate of the dead man. When the presumption arising from the absence of seven years is overthrown by the actual personal presence of the supposed dead man, it leaves no ground for sustaining the jurisdiction." Jochumsen v. Bank, 3 Allen, 87, 96. See, also, Waters v. Stickney, 12 Allen, 1, 13; Day v. Floyd, 130 Mass. 488, 489.

The Civil Code of Louisiana, in title 3, "Of Absentees," contains provisions for the appointment of a curator to take care of the property of any person, who is absent from or resides

out of the state, without having left an attorney therein; and for the putting of his presumptive heirs into provisional possession after he has been absent and not heard from for five, or, if he has left an attorney, seven, years, or sooner if there be strong presumption of his death; and for judicial sale, if necessary, of his movable or personal property, and safe investment of the proceeds; and, upon proof that he has not been heard from for 10 years, and has left no known heirs, for sale of his whole property and payment of the proceeds into the treasury of the state, as in the case of vacant successions; but neither the curator nor those in provisional possession can alienate or mortgage his immovables or real estate; and, if he returns at any time, he recovers his whole property, or the proceeds thereof, and a certain proportion of the annual revenues, depending upon the length of his absence. The main object of those provisions, as their careful regulations show, is to take possession of and preserve the property for the absent owner, not to deprive him of it upon an assumption that he is dead. Accordingly, the Supreme Court of Louisiana held that the appointment, by a court having jurisdiction of successions, of an administrator of the estate of a man represented to be dead, but who was in fact alive at the time of the appointment, was void; and that persons claiming land of his, under a sale by such administrator under order of the court, followed by long possession, could not hold the land against his heirs; and, speaking by Chief Justice Manning, said: "The title of Hotchkiss as administrator is null, because he had no authority to make it, and the prescription pleaded does not validate it. It was not a sale, the informalities of which are cured by a certain lapse of time and which becomes perfect through prescription; but it was void, because the court was without authority to order it. * * * It is urged, on the part of the defendants, that the decree of the court ordering the sale of the succession property should protect them, and, as the court which thus ordered the sale had jurisdiction of successions, it was not for them to look beyond it. But that is assuming as true that which we know was not true. The owner was not dead. There was no succession." And the court added that Chief Justice Marshall, in Griffith v. Frazier, above cited, disposed of that position. Burns v. Van Loan (1877) 29 La. Ann. 560, 563.

The absolute nullity of administration granted upon the estate of a living person has been directly adjudged or distinctly recognized in the courts of many other states. * * *

The only judicial opinions cited at the bar (except the judgment below in the present case) which tend to support the validity of letters of administration upon the estate of a living person were delivered in the courts of New York and New Jersey within the last 20 years.

In Roderigas v. Institution, 63 N. Y. 460, in 1875, a bare majority of the Court of Appeals of New York decided that payment of a deposit in a savings institution to an administrator under letter of administration issued in the lifetime of the depositor was a good defense in an action by an administrator appointed after his death, upon the ground that the statutes of the State of New York made it the duty of the surrogate, when applied to for administration on the estate of any person, to try and determine the question whether he was alive or dead, and therefore his determination of that question was conclusive. That decision was much criticised as soon as it appeared, notably by Chief Justice Redfield in 15 Am. Law Reg. (N. S.) 212. And in a subsequent case between the same parties in 1879 the same court unanimously reached a different conclusion, because evidence was produced that the surrogate never in fact considered the question of death, or had any evidence thereof,—thus making the validity of the letters of administration to depend not upon the question whether the man was dead, but upon the question whether the surrogate thought so. Roderigas v. Institution, 76 N. Y. 316.

In Plume v. Institution, 46 N. J. Law, 211, 230, in 1884, which was likewise an action to recover the amount of a deposit in a savings institution, the plaintiff had been appointed by the surrogate administrator of a man who, as the evidence tended to show, had neither drawn out any part of the deposit, nor been heard from, for more than 20 years; an inferior court certified to the Supreme Court of New Jersey the questions whether payment of the amount to the plaintiff would bar a recovery thereof by the depositor, and whether the plaintiff was entitled to recover; and that court, in giving judgment for the plaintiff, observed, by way of distinguishing the case from the authorities cited for the defendant, that "in most, if not all, of such cases,

it was affirmatively shown that the alleged defendant was actually alive at the time of the issuance of letters of administration, while in the present case there is no reason for even surmising such to have been the fact."

The grounds of the judgment of the Supreme Court of the State of Washington in the case at bar, as stated in its opinion, were that the equities of the case appeared to be with the defendants; that the court was inclined to follow the case of Roderigas v. Institution, 63 N. Y. 460; and that, under the laws of the territory, the probate court, on an application for letters of administration, had authority to find the fact as to the death of the intestate, the court saying: "Our statutes only authorize administration of the estates of deceased persons, and before granting letters of administration the court must be satisfied by proof of the death of the intestate. The proceeding is substantially in rem, and all parties must be held to have received notice of the institution and pendency of such proceedings, where notice is given as required by law. Sec. 1299 of the 1881 Code gave the probate court exclusive original jurisdiction in such matters, and authorized such court to summon parties and witnesses, and examine them touching any matter in controversy before said court or in the exercise of its jurisdiction." Such were the grounds upon which it was held that the plaintiff had not been deprived of his property without due process of law. 5 Wash. 309, 317, 318, 31 Pac. 873.

After giving to the opinion of the Supreme Court of the state the respectful consideration to which it is entitled, we are unable to concur in its conclusion or in the reasons on which it is founded.

The fourteenth article of amendment of the constitution of the United States, after other provisions which do not touch this case, ordains: "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities. Virginia v. Rives, 100 U. S. 313, 318, 319; Ex parte Virginia, Id. 339, 346; Neal v. Delaware, 103, U. S. 370, 397. And the first one, as said by Chief Justice Waite in U. S. v. Cruikshank, 92 U. S. 542, 554, repeating the words of Mr. Jus-

tice Johnson in Bank v. Okely, 4 Wheat. 235, 244, was intended "to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the constitution of the United States, this court is no more bound by that court's construction of a statute of the territory or of the state, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case this court must decide for itself the true construction of the statute. Huntington v. Attrill, 146 U. S. 657, 683, 684, 13 Sup. Ct. 224; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 492-495, 14 Sup. Ct. 968.

No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.

The words "due process of law," when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, "mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance." Pennoyer v. Neff, 95 U. S. 714, 733.

Even a judgment in proceedings strictly in rem binds only those who could have made themselves parties to the proceedings, and who had notice, either actually or by the thing condemned being first seized into the custody of the court. The Mary, 9 Cranch, 126, 144; Hollingsworth v. Barbour, 4 Pet. 466, 475; Pennoyer v. Neff, 95 U. S. 714, 727. And such a judgment is wholly void if a fact essential to the jurisdiction of

the court did not exist. The jurisdiction of a foreign court of admiralty, for instance, in some cases, as observed by Chief Justice Marshall, "unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property." Rose v. Himely, 4 Cranch, 241, 269. Upon the same principle, a decree condemning a vessel for unlawfully taking clams, in violation of a statute which authorized proceedings for her forfeiture in the county in which the seizure was made, was held by this court to be void, and not to protect the officer making seizure from a suit by the owner of the vessel, in which it was proved that the seizure was not made in the same county, although the decree of condemnation recited that it was. Thompson v. Whitman, 18 Wall. 457.

The estate of a person supposed to be dead is not seized or taken into the custody of the court of probate upon the filing of a petition for administration, but only after and under the order granting that petition; and the adjudication of that court is not upon the question whether he is living or dead, but only upon the question whether and to whom letters of administration shall issue. Insurance Co. v. Tisdale, 91 U. S. 238, 243.

The local law on the subject, contained in the Code of 1881 of the territory of Washington, in force at the time of the proceedings now in question, and since continued in force by article 27, § 2, of the constitution of the state, does not appear to us to warrant the conclusion that the probate court is authorized to conclusively decide, as against a living person, that he is dead, and his estate therefore subject to be administered and disposed of by the probate court.

On the contrary, that law, in its very terms, appears to us to recognize and assume the death of the owner to be a fundamental condition and prerequisite to the exercise by the probate court of jurisdiction to grant letters testamentary or of administration upon his estate, or to license any one to sell his lands for the payment of his debts. By section 1, the common law of England, so far as not inconsistent with the constitution and laws of the United States, or with the local law, is made the rule of decision. In the light of the common law, the exclu-

sive original jurisdiction conferred by section 1299 upon the probate court in the probate of wills and the granting of letters testamentary or of administration is limited to the estates of persons deceased; and the power conferred by that section to summon and examine on oath, as parties or witnesses, executors and administrators or other persons intrusted with or accountable for the "estate of any deceased person," and "any person touching any matter of controversy before said court or in the exercise of its jurisdiction," is equally limited. By section 1340, wills are to be proved and letters testamentary or of administration are to be granted in the county of "which deceased was a resident," or in which "he may have died," or in which any part of his estate may be, "he having died out of the territory." By section 1388, administration of the estate of "a person dying intestate" is to be granted to relatives, next of kin, or creditors, in a certain order, with a proviso in case the person so entitled or interested neglect "for more than forty days after the death of the intestate" to apply for administration. By section 1389, an application for administration must "set forth the facts essential to giving the court jurisdiction of the case," and state "the names and places of residence of the heirs of the deceased, and that the deceased died without a will," and, by section 1391, notice of such application is to be given by posting in three public places in the county where the court is held a notice "containing the name of the decedent," the name of the applicant, and the time of hearing. And, by sections 1493 and 1494, a petition by an executor or administrator for the sale of real estate for the payment of debts must set forth "the amount of the personal estate that has come to his hands, and how much, if any, remains undisposed of, a list and the amounts of the debts outstanding against the deceased, as far as the same can be ascertained, a description of all the real estate of which the testator or intestate died seized, the condition and value of the respective lots and portions, the names and ages of the devisees, if any, and of the heirs of the deceased"; and must show that it is necessary to sell real estate "to pay the allowance to the family, the debts outstanding against the deceased, and the expenses of administration."

Under such a statute, according to the overwhelming weight

of authority, as shown by the cases cited in the earlier part of this opinion, the jurisdiction of the court to which is committed the control and management of the estates of deceased persons, by whatever name it is called,—ecclesiastical court, probate court, orphans' court, or court of the ordinary or the surrogate, —does not exist or take effect before death. All proceedings of such courts in the probate of wills and the granting of administrations depend upon the fact that a person is dead, and are null and void if he is alive. Their jurisdiction in this respect being limited to the estates of deceased persons, they have no jurisdiction whatever to administer and dispose of the estates of living persons of full age and sound mind, or to determine that a living man is dead, and thereupon undertake to dispose of his estate.

A court of probate must, indeed, inquire into the person whose will is sought to be proved or whose estate is sought to be administered, because without that fact, the court has no jurisdiction over his estate; and not because its decision upon the question, whether he is living or dead, can in any wise bind or estop him, or deprive him, while alive, of the title or control of his property.

As the jurisdiction to issue letters of administration upon his estate rests upon the fact of his death, so the notice given before issuing such letters assumes that fact, and is addressed, not to him, but to those who after his death may be interested in his estate, as next of kin, legatees, creditors, or otherwise. Notice to them cannot be notice to him, because all their interests are adverse to his. The whole thing, so far as he is concerned, is *res inter alios acta.*

Next of kin or legatees have no rights in the estate of a living person. His creditors, indeed, may, upon proper proceedings, and due notice to him, in a court of law or of equity, have specific portions of his property applied in satisfaction of their debts. But neither creditors nor purchasers can acquire any rights in his property through the action of a court of probate, or of an administrator appointed by that court, dealing, without any notice to him, with his whole estate as if he were dead.

The appointment by the probate court of an administrator of the estate of a living person, without notice to him, being

without jurisdiction, and wholly void as against him, all acts of the administrator, whether approved by that court or not, are equally void. The receipt of money by the administrator is no discharge of a debt, and a conveyance of property by the administrator passes no title.

The fact that a person has been absent and not heard from for seven years may create such a presumption of his death as, if not overcome by other proof, is such prima facie evidence of his death that the probate court may assume him to be dead, and appoint an administrator of his estate, and that such administrator may sue upon a debt due to him. But proof, under proper pleadings, even in a collateral suit, that he was alive at the time of the appointment of the administrator, controls and overthrows the prima facie evidence of his death, and establishes that the court had no jurisdiction and the administrator no authority; and he is not bound, either by the order appointing the administrator or by a judgment in any suit brought by the administrator against a third person, because he was not a party to and had no notice of either.

In a case decided in the circuit court of the United States for the southern district of New York in 1880, substantially like Roderigas v. Institution, as reported in 63 N. Y. 460, above cited, Judge Choate, in a learned and able opinion, held that letters of administration upon the estate of a living man, issued by the surrogate after judicially determining that he was dead, were null and void as against him; that payment of a debt to an administrator so appointed was no defense to an action by him against the debtor; and that to hold such administration to be valid against him would deprive him of his property without due process of law, within the meaning of the fourteenth amendment of the constitution of the United States. This court concurs in the proposition there announced "that it is not competent for a state, by a law declaring a judicial determination that a man is dead, made in his absence, and without any notice to or process issued against him, conclusive for the purpose of divesting him of his property and vesting it in an administrator, for the benefit of his creditors and next of kin, either absolutely or in favor of those only who innocently deal with such administrator. The immediate and necessary effect of such a law is to deprive him of his property without any

process of law whatever, as against him, although it is done by process of law against other people, his next of kin, to whom notice is given. Such a statutory declaration of estoppel by a judgment to which he is neither party nor privy, which has the immediate effect of divesting him of his property, is a direct violation of this constitutional guaranty." Lavin v. Bank, 18 Blatchf. 1, 24, 1 Fed. 641.

The defendants did not rely upon any statute of limitations, nor upon any statute allowing them for improvements made in good faith; but their sole reliance was upon a deed from an administrator, acting under the orders of a court which had no jurisdiction to appoint him or to confer any authority upon him, as against the plaintiff.

Judgment reversed, and case remanded to the supreme court of the state of Washington for further proceedings not inconsistent with this opinion.

In Re ZEPH'S ESTATE.

50 Hun 523, 3 N. Y. Supp. 460. 1888.

INGALLS, J. In November, 1887, Edward Zeph was an inhabitant of Schenectady county, in this state. He was indicted, tried, and convicted of the crime of murder in the second degree, and sentenced to the state prison for life, and is now in prison under such sentence. Fidel Zeph, the only brother of such convicted person, applied to such surrogate for letters of administration upon the estate of such prisoner, which were denied by the surrogate, upon the ground that he possessed no jurisdiction to grant such letters, as the said Edward Zeph was still living. We are convinced that the decision of the surrogate was correct.

The contention of the counsel for the appellant is that by force of such conviction and judgment thereon the said Edward Zeph became and is civilly dead, and that his estate became the subject of administration, the same as though he were actually dead. We are satisfied that the provisions of the Code of Civil Procedure, from which surrogates derive their authority to grant letters of administration, have no application to a case of civil death, but apply only to cases of

actual death. It will be perceived by referring to section 2660 of the Code of Civil Procedure, and the following sections upon that subject, that whenever mention is made of the estate upon which administration may be granted, the word "decedent" is employed; as, for instance, in said section 2660 the expression is found: "and of the next of kin of the decedent;" in section 2661, "that the decedent left no will." The same term is to be found in section 2663 and section 2665. We think that the word "decedent," as thus employed in framing the statute, was intended by the law-makers to be understood and applied in the usual and ordinary sense of the term. Webster defines the word "decease" as follows: "To depart from this life, to die." The word "decedent" is defined: "A deceased person."

There is nothing in the statute, which we discover, which in the slightest degree favors a construction that civil death was intended to be included as a ground for granting such admintration. Indeed, the entire proceedings in regard to administering the estates of deceased persons seem to negative the idea that civil death was intended to be included within the cases provided for by such statute. Such right to administration should not be extended by implication, doubtful construction, or judicial legislation. If it should be deemed safe and judicious to include civil death as a ground for granting such letters of administration, the legislature must furnish the remedy, and not the court. The effect of imprisonment for life upon the civil rights of the prisoner was considered in Avery v. Everett, 36 Hun, 6; and upon appeal to the court of appeals the subject was elaborately discussed, and the decision of that court is to be found in 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. Rep. 368. We understand such decision to be, upon principle, adverse to the contention of the appellant's counsel herein.

It was suggested by such counsel, upon the argument, that the discussion of that question in the court of appeals should be regarded as obiter. We do not so regard it, as the question considered was involved in the case discussed by the members of the court, and concurred in generally by all the judges present, except Judge Earl, who delivered a dissenting opinion. Under such circumstances, we must regard such question as

within the determination of that court in that case, and, so far as it applies upon the question under consideration in this case, as conclusive herein.

The order of the surrogate should be affirmed. All concur.

JOHNSON v. JOHNSON.

15 R. I. 109, 23 Atl. 106. 1885.

MATTESON, J. This is an appeal from a decree of the court of probate of Cranston, appointing an administrator of the estate of Anna Johnson, deceased. The intestate died in Cranston on the 17th day of January, 1885. At and for several years prior to her death she had resided in Cranston, and in the family of Charles E. Johnson, the appellee, whose wife, also deceased, was her illegitimate daughter. The appellant, Walter H. Johnson, and his sister, Mary E. Seward, wife of Charles R. Seward, of Chicago, Ill., are children of the said Charles E. Johnson by his said wife, and grandchildren of the intestate. Both Charles E. Johnson and his son, the said Walter H. Johnson, made application to the court of probate to be appointed administrator. Mrs. Seward objected to the appointment of her brother, and requested the appointment of her father. The court appointed the father, and the son appealed.

The son claimed the appointment as next of kin of the intestate, under Pub. St., c. 184, § 4, which is as follows: "Administration of the estate, both real and personal, of a person dying intestate, shall be granted to the widow or next of kin of the intestate, being suitable persons, and of the age of twenty-one years, or to both, as the court of probate shall think fit." On the part of the father it was argued that Pub. St., c. 184, § 4, had no application, the son not being, in contemplation of law, next of kin of the intestate, because his mother, being the illegitimate daughter of the intestate, was not, at common law, of the kindred of the mother, though the same blood ran in their veins; and that while Pub. St., c. 187, § 7, in these words: "Bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother"

—has so far changed the common law as to enable illegitimate children to take and transmit inheritances collaterally on the part of their mother, the statutes have nowhere made such illegitimate children kindred of their mother, and consequently, as the mother of the appellant was not kindred of the intestate, her son is not.

If we concede the force of this argument, and grant that the appellant is not, in legal contemplation, next of kin to the intestate, we nevertheless think that he is entitled to the appointment. If he is not to be regarded as such next of kin, then no application by such next of kin for letters of administration has been made within thirty days from the death of the intestate, and under Pub. St., c. 184, § 5, it is competent for the court to commit administration to some suitable person of full age, not a member of the court. For aught that appeared at the hearing, the appellant answers these requirements of the statute. In granting administration the primary object is the interest of the estate; hence courts have deemed it their duty to place the administration in the hands of the person most likely to convert the property to the best advantage of those beneficially interested. Other things being equal, that person will be he who is entitled as distributee, in whole or in part, to the residue of the estate after the claims of creditors have been satisfied, because of his interest. It is therefore an established principle governing courts exercising probate jurisdiction that the right to the administration of the effects of an intestate follows the property in them. * * *

In 1 Will. Ex'rs 436, the author remarks that both in the common law and spiritual courts it has always been considered that the object of the statutes of administration, 31 Edw. III, c. 11, and 21 Hen. VIII, c. 5, is to give the management of the property to the person who has the beneficial interest in it; and the inclination to effectuate this object has been so strong that in some instances not only the practice of the ecclesiastical court, but the decisions of the judges delegate, have not scrupled to disregard the express words of the statute; and he cites the cases of Bridges v. Duke of Newcastle, cited by the court in West v. Willby, 3 Phillim. Ecc. 381, and Young v. Pierce, Freem. 496. In the former, Lord Hollis had died intestate, and Bridges claimed administration as next of kin. The effects

were vested by act of parliament in the duke of Newcastle, to pay the debts of the deceased. The judge of the prerogative court, and afterwards the delegates, held that the next of kin was excluded on the ground that he had no interest, and granted administration to the duke of Newcastle. In the latter, administration was refused by the prerogative and the delegates to a next of kin on the ground that she had released her interest, and the letters were granted to the party beneficially entitled to the personal estate. And see, also, Thornton v. Winston, 4 Leigh (Va.) 153, 163; Leverett v. Dismukes, 10 Ga. 98, 99.

Under our statutes of descent and distribution (Pub. St., c. 187, §§ 1, 5, 7, 9), the appellant and his sister are the persons entitled to the surplus of the personal estate of the intestate after payment of her just debts, funeral charges, and the expenses of settling her estate. It follows, therefore, that they are the persons who would, if competent, be entitled to the administration. Mrs. Seward, however, is not an applicant, and, if she were, her coverture and nonresidence would probably be regarded as sufficient disqualifications to prevent her appointment. If there was any good reason against appointing her brother, her wishes in regard to the appointment would be entitled to consideration; but, in the absence of such reason, we cannot permit them to operate to his exclusion, he being equally entitled with herself, and both competent and desirous to act. McBeth v. Hunt, 2 Strob. (S. C.) 335; Heron's Estate, 6 Phila. (Pa.) 87, 88; In re Cresse, 28 N. J. Eq. 236, 237; Cobb v. Newcomb, 19 Pick. (Mass.) 336.

The decree of the court below must be reversed, and letters of administration granted to the appellant. Order accordingly.

Choses in Action.

BRADSHAW v. LANCASHIRE & Y. RY.

L. R. 10 C. P. 189 (Eng.). 1875.

At the trial, before Denman, J., at the last Manchester spring assizes, the facts were as follows: The female plaintiff was the executrix of the testator, and he, while traveling on the defendant's railway, had been injured by a railway accident. He

ultimately died from the injuries received, and it was not disputed that he had incurred expenses for medical attendance amounting to £40, and that the loss occasioned to his estate in respect of his being unable to attend to business previous to his death was £160.

It was contended, however, on the part of the defendants, that the maxim "Actio personalis moritur cum persona" applied, and that the action was not maintainable; and, secondly, that the damages for loss of business were too remote. The verdict was entered for the plaintiffs for £200, leave being reserved to the defendants to enter a verdict for themselves or to reduce the damages on the above grounds.

A rule nisi had been obtained accordingly.

GROVE, J. I am of opinion that this rule should be discharged. The action is brought by the executrix of a person whose death was caused by a railway accident, in respect of damages occasioned to the testator's estate. It is to be taken that the estate was damaged, not consequentially upon the testator's death, but by his inability to attend to his business in his lifetime, the direct and natural result of the injury he suffered. It is no doubt singular that up to the case of Potter v. Metropolitan District Ry. Co., 30 L. T. (N. S.) 765, no action of this kind appears to have ever been brought, a circumstance which has been sometimes relied on as an argument against sanctioning a new form of action. It may, however, be that this is accounted for by the comparative infrequency of accidents of this sort in former times, and the fact that until Lord Campbell's act the right to damages for the personal injury, as compared with which the damages to the estate would generally be a small matter, was lost by the death of the party injured. The same argument might have been applied to the action in Potter v. Metropolitan District Ry. Co., up to the decision of which case no action of the kind had ever been heard of, so far as I know, if we except the case put by way of illustration by Richardson, J., in Knights v. Quarles, 2 B. & B. 102.

The Court of Exchequer Chamber, nevertheless, held in that case that the action would lie, and by their decision we are bound, unless the present case is so far distinguishable as to

render the same principle inapplicable. I am of opinion that it is not, and there is a sufficient ground of action here. The ground of action in both cases is that there has been a breach of a contract made with the testator during his lifetime, whereby in his lifetime his estate was injured by his having to pay medical and other expenses, and injury to his business, the direct and immediate consequence of the accident.

Does the fact that, in this case, besides the injury to the estate, the testator's death has likewise resulted from the breach of contract, make any difference, or does the fact that provision has been made in such cases for compensation in respect of the death to certain relatives by Lord Campbell's act, take away any right of action that the executrix would have had but for that act? It does not seem to me that the act has that effect, either expressly or by necessary implication. The intention of the act was to give the personal representative a right to recover compensation as a trustee for children or other relatives left in a worse pecuniary position by reason of the injured person's death, not to affect any existing right belonging to the personal estate in general. There is no reason why the statute should interfere with any right of action an executor would have had at common law. In the case of such right of action he sues as legal owner of the general personal estate which has descended to him in course of law; under the act he sues as trustee in respect of a different right altogether on behalf of particular persons designated in the act. Another argument for the defendants was, that inasmuch as the remedy for the personal injury died with the person, the damages to the estate, being consequential on the personal injury, died also. I do not at all see that that follows as a necessary or logical consequence. The two sorts of damage are separable: the one is pecuniary loss to the estate immediately and naturally arising out of the accident; the other is personal to the party injured, and as such dies with the person. I do not see that there is any valid distinction between this case and that of Potter v. Metropolitan District Ry. Co., or why the damage to the estate, that would clearly be recoverable if the injured party lived, should be the less recoverable because of his death. For these reasons, I am of opinion that the action is maintainable. * * *

DENMAN, J. I am of the same opinion. Whatever may be the usual form of action in such cases, it is quite clear that the declaration in this case was framed in contract. The damage alleged was damage to the estate of the testator, and at the trial two heads of damage were shown: viz., £160, damage in respect of the business, which it was agreed had suffered to that amount, and £40, medical and other expenses. I am of opinion that the plaintiffs are entitled to retain the verdict for the full amount of £200.

The first question was, whether the action can be maintained at all. The action is for breach of contract occurring in the lifetime of the testator, but which ultimately caused his death. And it was urged that the case fell within Lord Campbell's act, that the only action that could be brought was under that act, and that these damages could not be recovered as damages to the estate. This appears, no doubt, to be the first case of similar damages being sued for in an action like the present, but there is considerable authority for holding as we do.

In Williams on Executors, vol. 1, p. 798, a work in itself of great authority, all the cases on the subject are commented upon and the law is stated entirely in accordance with the dictum of Richardson, J., in Knights v. Quarles. It is distinctly laid down that an executor may recover damages to the personal estate arising out of a contract, though an action of tort might have been brought for the personal injury, resulting from the same act of defendant, before the death of the testator. The case of Alton v. Midland Ry. Co., 19 C. B. (N. S.) 213; 34 L. J. (C. P.) 292, is also referred to in a note; and it is clear the learned author, who was a judge of this court, when that case was decided, looked upon the dictum of Willes, J., in that case as a confirmation of the opinion of Richardson, J., in Knights v. Quarles. He proceeds, however, to say that the rule there laid down must be taken to be limited by a qualification introduced by the modern decision of Chamberlain v. Wilkinson, 2 M. & S. 408, viz., that an action is purely personal, and there is no damage to the estate. In that case the action was for breach of promise of marriage, and the decision turns distinctly on the ground that there was no special damage stated on the record, and so the executor could not have an action because the only damages recoverable were purely per-

sonal. Here, the damages are not personal in their nature, but are damages to the estate, and the case falls, therefore, within the rule as laid down by Sir Edward Vaughan Williams, and not the exception.

Again, the case of Potter v. Metropolitan District Ry. Co., though not exactly in point, is to some extent an authority in favor of the view we take. In one respect it was a stronger case, for it was doubtful there whether the declaration was in contract, whereas it clearly is so here. There the wife was the person to whom the injury was done, and she sued as executrix to her husband, who had died, in respect of the damage to the personal estate. The case was not, therefore, one of personal injury ultimately causing death, and consequently is not on all fours with the present. The principle, however, of the decision is quite consistent with our judgment in this case. The rule to enter a nonsuit must for these reasons be discharged. * * *

Rule discharged.

DIVISION II

GUARDIAN AND WARD

CHAPTER XIV.

DEFINITIONS AND GENERAL PRINCIPLES.

Guardianship in the United States.

IN THE MATTER OF ICHABOD ANDREWS, AN INFANT.

1 Johnson Ch. 99 (N. Y.). 1814.

The petition of Sarah Gilbert stated that she was the mother of the infant, who was born in October, 1807, and that in December, 1808, Justus Gilbert, the second husband of the petitioner, was, by the surrogate of Cayuga county, appointed guardian to the infant, and by virtue of that appointment possessed himself of the real and personal estate of the infant; that in January, 1812, Justus Gilbert absented himself from the petitioner in a secret manner and enlisted in the army of the United States for five years; that he is now on the western frontier, and has converted to his own use the personal estate, and the rent and profits of the real estate, and has lately attempted to dispose of the real estate; and that he is in habits of extreme intemperance, etc.; and that the infant is a charge on the petitioner, who prayed for relief, etc.

The facts in the petition were sworn to.

THE CHANCELLOR. Though the guardian was in this case appointed by the surrogate, under the act of 1813 (N. Y. Laws, Vol. 1, 454), he is as much under the superintendence and control of this court as if he had been appointed by it in the first instance. Power of the surrogate extends only to the appointment of the guardian; he has no general jurisdiction over him as trustee. That power remains unimpaired in this court, and

every guardian, however appointed, is responsible here for his conduct, and may be removed for misbehavior. It has repeatedly been declared that a testamentary or statute guardian is as much under the superintendence of the board of chancery as the guardian in socage. Beaufort v. Berte, 1 P. Wms. 704; Eyre v. Countess of Shaftsbury, 2 P. Wms. 107; Rouch v. Garvar, 1 Ves. 160. I shall, therefore, direct a reference to a master, to ascertain the proof of the allegations contained in the petition, and to report thereon.

Rule accordingly.

The Court Appointing.

TAFF v. HOSMER.

14 Mich. 249. 1866.

Special motion to dismiss a writ of error, to Wayne Circuit.

CAMPBELL, J. This is a motion to dismiss a writ of error, on two grounds: first, because Taff omitted to join in a former writ, which was dismissed; and second, because he is not entitled to consider himself aggrieved by the judgment below.

The case in the court below was an appeal from the allowance by the Probate Court of Wayne County of the last will of Cyrus W. Jackson, whereby he left all his property, with some small exceptions, to his son, Samuel W. Jackson, an infant of tender years, and appointed Bissell and Hosmer guardians and executors. The appeal was brought by Taff as grandfather of the child, who was an only child. * * *

We are, therefore, compelled to consider whether Mr. Taff has the right to consider himself aggrieved by the judgment below.

It appears that, instead of moving to dismiss his appeal in the Circuit Court, the proponents of the will joined issue with him on the merits, and the judgment affirming the will is also in form a personal judgment against him for costs. This liability is clearly a personal grievance of his own, upon which error may be brought, and the writ, therefore, is not irregular. But if he has no further interest in the judgment below, this would give him no right to dispute the will itself, and no error appears

to be assigned on this point. We are therefore called upon to examine the more serious question, whether he was legally interested in the main controversy.

The disposition of Mr. Jackson's estate and the appointment of guardians, are both contained in the same will, there being no codicils. We have no difficulty in holding that Taff could not contest a will merely disposing of the property. He is neither heir, devisee, nor next of kin, and is therefore a stranger to the inheritance. No case has been cited, and we presume none exists, which would favor any pretense of right to interfere with the disposition of property because he is next of kin to the heir, who is the only person living concerned in opposing a will which lessens his inheritance.

It is claimed, however, that Taff has a legal right to be heard upon any question involving the guardianship of his grandchild, and that on this account he may oppose the will, because the question of guardianship cannot be severed from the rest of that instrument.

Our statutes give to the father, and, where there is no father, to the mother (where capable of acting), control of the infant's person. 2 C. L. §§ 3303-4. In all other cases the guardian appointed by the Judge of Probate controls both persons and property. And where an infant is under fourteen years of age, the judge (except in the cases mentioned) is not compelled to select the guardian from any particular class of persons. § 3300. We do not find in the statute any right secured to any relatives but the father and mother, to retain control of the infant by any species of guardianship, and as the statute covers the entire subject, we must find his right, if it exists, in some form distinct from any absolute claim to appointment.

The question, then, arises, whether his relationship entitled him to be heard in any proceeding to obtain guardianship. If he could appear as a matter of right, upon any application for that purpose, we think it must follow that he could appear to contest the validity of a will appointing guardians. If he could not interfere of right in the one case, he is upon the same grounds a stranger to the other. Although, if the will is duly executed, no one can complain of the father's choice, yet we think it competent for such persons as are legally concerned to dispute the fact of any such choice having been made.

We are therefore to inquire what persons are considered as authorized to intervene in the Probate Court, besides the father and mother, and the infant himself.

The statute throws no light upon this question. It simply declares that "The Judge of Probate in each county, when it shall appear to him necessary or convenient, may appoint guardians to minors and others," etc.; § 3299; and that "if the minor is under the age of fourteen years, the judge of probate may nominate and appoint his guardian." § 3300. If we were to assume that this language was designed to exhaust the subject, we should be compelled to find that the law had placed infants under the age of fourteen in a complete state of isolation from all the ties of blood, and all the associations which we are apt to consider as natural bonds of union. It does not seem probable that any civilized legislation would deliberately cut him loose from his relatives altogether, and leave him entirely at the mercy of strangers. There can be no doubt that the judge of probate is the ultimate arbiter in the selection, but if no one else has any right to intervene to aid him in making a good and rejecting a bad choice, the condition of a helpless child would be most deplorable. And yet, if there is no law on the subject, it cannot be helped by any regrets.

We do not think the matter has been left in such an anomalous condition. Although probate courts are new institutions, unknown to the ancient law, and although the appointment of guardians is in this state vested in those courts, yet the jurisdiction is not in itself a new one, and must be considered as having been transferred with such of its incidents as can be properly exercised in the new tribunal. The power of appointing guardians is one which was formerly vested in the court of chancery. Authorities have not agreed upon its origin as a prerogative or a judicial authority, but it has long been settled that, so far as infants are concerned (although perhaps otherwise as to lunatics), the jurisdiction is one belonging to the court and not a personal one in the chancellor. Ex parte Phillips, 19 Ves. 118; 2 Fomblanque's Eq. 232. It has also been sometimes asserted that the jurisdiction of equity was one relating to property rather than to person, but while the court can rarely find it necessary to interfere when an infant has no estate, yet the jurisdiction does not depend upon that fact.

Wellesley v. Duke of Beaufort, 2 Russ. Ch. 21. We regret that upon the argument the authorities bearing upon this jurisdiction were not brought to our attention. We have been obliged to make such investigation as our own facilities have enabled us to pursue.

* * * * * * * * *

It is apparent that if there are not some persons besides the infant who have an absolute right to present their views concerning the guardianship, his interests will often be at the mercy of persons by no means calculated to protect him. And when the settled practice requires certain persons to be at liberty to appear before the master, and requires him to ascertain and report who are the infant's relations, it must be for some useful purpose, and not to preclude them from intervening. Mr. Hoffman evidently understood the English practice as providing for such intervention, and he expresses regret that the New York rules had not expressly required the same precautions adopted in England.—Hoffman's Master in Ch. 131, 132.

The case of Morehouse v. Cooke, Hopk. Ch. 226, is the only case we have been able to discover in which a statute like ours, so far as the original right of appointment is concerned, has received construction. In that case a guardian had been appointed on an ex parte hearing, without notice to the relations. One of these relatives, who had not appeared before the surrogate, appealed to the court of chancery. The chancellor sustained the appeal, censured the surrogate severely for not giving notice, and although the proceedings had been fair, and the guardian was unexceptionable, he removed him and appointed the appellant in his place.

The attention of the legislature being thus called to the subject, there are now express enactments on the subject in New York, requiring notice to be given, but only to such relatives as the surrogate may direct. This notice was by the Revised Statutes required to be given to all relatives by blood or affinity in the county. Underhill v. Dennis, 9 Paige, 206. Such a notice included, of course, many persons who had no interest as possible distributees, and the amendatory law, while it left the matter somewhat in the surrogate's discretion, did not confine the notice even to blood relations. The object of such a notice,

including so large a range of persons, was mainly to enable him to obtain information concerning the qualifications of candidates and the position of the infant; and it was accordingly held in Kellinger v. Roe, 7 Paige, 362, that such persons resisting an appointment, but not acting as petitioners, were not parties to the appeal of the unsuccessful applicant whom they had opposed. But in Underhill v. Dennis, 9 Paige, 202, where a person who was not a relative, but with whom the infant had been left by his mother, applied verbally to a surrogate and was refused guardianship, and appealed from a subsequent appointment of a guardian made on a written petition ex parte and without notice, the chancellor entertained the appeal, and reversed the decree as irregular, upon the express ground that notice should have been given to the relatives.

We are entirely satisfied that the next of kin may, if they see fit, make themselves parties to guardianship proceedings, and that when they do so, they may appeal from an adverse decision. And we are therefore of opinion that they may be proper parties to oppose the probate of a testamentary provision appointing guardians. This, of course, gives them no right to oppose it on any ground except that it is not a valid will, as a father's testamentary power cannot be reviewed. Neither does it give them rights to oppose the probate of any instrument not appointing guardians.

The motion must be denied, but under the circumstances we do not deem the plaintiffs entitled to costs. We shall be prepared to hear the case in its order on the merits.

The other justices concurred.

IN THE MATTER OF THE GUARDIANSHIP OF LAURA DANNEKER, A MINOR.

67 Cal. 643. 1885.

Application for a writ of prohibition. The facts are stated in the opinion of the court.

MYRICK, J. Application for a writ of prohibition to the Superior Court of the city and county of San Francisco, Department Nine.

On the 19th of June, 1885, one Teresa McGee presented her petition to the said Superior Court of the city and county of San Francisco, in which she averred that some six years ago Mrs. Danneker, a widow, the mother of the said Laura, placed the child under her care as Superioress of St. Joseph's Orphan Asylum, in said city and county; that afterward the mother died, leaving no estate except $170, which had been expended in the maintenance of said Laura and two other of her minor children; that after the death of the mother the petitioner placed the said Laura under the care of a Mrs. Trendle, who agreed to support and raise her under her personal care; that afterward Mrs. Trendle, without the knowledge of petitioner, gave the custody of the child to Jacob Michelson, who had ever since had the custody of her, and that she was then at a boarding school in Alameda county, kept by Mrs. Kegler; that said child was then nine years of age, a full orphan, and had no property and no guardian; that said Michelson and Mrs. Trendle and the said child were residents of said city and county, though the child was temporarily at a school in Alameda county, and the petitioner prayed that letters of guardianship be issued to her.

The Superior Court made an order that citation issue, returnable June 30th, and that it be served on the said minor and on Jacob Michelson, Mrs. Trendle and Mrs. Kegler. The citation was duly served.

After the services of the citation, and on the 23rd of June (the return day of the citation being June 30th), the said Michelson presented a petition to one of the judges of the Superior Court of Alameda county, in which he averred that said minor was a resident of Alameda county, under the care of Mrs. Kegler, and had no guardian, and prayed for letters of guardianship. The petition was signed by said Michelson and C. P. Goff, as his attorney. In this petition no mention was made of the proceedings in the Superior Court of the city and county of San Francisco, and the judge in Alameda county, not being informed thereof, made an order for service of citation on Mrs. Kegler and Mrs. Trendle. On the return day, to wit, June 29th, after hearing evidence offered by Michelson, the court found that the minor resided in Alameda county, and granted the prayer of the petition of Michelson for letters. On

the return day of the citation in the Superior Court of the city and county of San Francisco, to wit, June 30th, the said Michelson, by his attorney, filed objections to the petition of the said Teresa McGee, and the hearing was postponed until July 14th, on which day the said Michelson, by his said attorney, presented a certified copy of the proceedings in the Superior Court of Alameda county, and moved that the petition of said Teresa McGee be dismissed, on the ground that the court had no jurisdiction, letters having been already granted to him by the Superior Court of Alameda county. Further hearing was continued to July 23rd, and before that day an alternative writ of prohibition herein was granted, and an order to show cause made.

There is no doubt that at the time the said Teresa McGee presented her petition to the Superior Court of the city and county of San Francisco, and citation was served on Michelson, and the others, that court had jurisdiction to hear and determine whether the minor was a resident of that city and county, and required a guardian, and whether the said Teresa was a proper person to be appointed. The question, then, is presented, could Michelson (instead of presenting the issue of residence and the other subjects involved to the Superior Court of the city and county of San Francisco), step over to Alameda county, obtain letters there, and thus oust the former court of jurisdiction to proceed? We think not. It is proper to presume that the Superior Court of Alameda county will, when its attention is brought to the fact that a petition was first filed in the city and county of San Francisco, revoke its order of appointment and recall its letters, to the end that there may be no conflict of jurisdiction. It is apparent that there cannot be two guardianships in two different courts at the same time. Letters will be issued, if necessary, by the court of the county where it may be legally determined the child resides.

* * * * * * * * *

We do not intend to prejudge the proceedings taken by either one; we desire merely to call attention to the risk that may have been run. * * *

The application for the writ is denied, and the order heretofore made is vacated.

MORRISON, C. J., and THORNTON, J., concurred.

As to the Ward's Property.

STATE v. CLARK.

16 Ind. 97. 1861.

Appeal from the St. Joseph's Common Pleas.

PERKINS, J. Suit upon a guardian's bond. * * *

Two questions of law are raised and argued by counsel which will be considered and decided. The ward, who now sues her guardian on his bond for wasting her estate, was supported by that guardian from infancy to the sixteenth year of her age. In that support, the guardian used the interest and a portion of the principal of her personal estate, without having first obtained the direction of the proper court. He set up that use in defense against this suit, and the defense was allowed. It is claimed, on the part of the appellant: 1. That the guardian cannot have a credit for such expenditure in any suit in any court. 2. That if he can, it will not be allowed in a suit on the bond.

If the credit is allowable at all, the account can be taken and the credit allowed, under our present practice, in the suit on the bond. The State v. Strange, 1 Ind. 538; The State ex rel. v. Hughes, 15 Id. 104. Can such a credit be allowed? As a question of power with regard now to the propriety of the allowance in this particular case, can the court make it in any case?

Blackstone says, Book 1, p. 462, that, "The power and reciprocal duty of a guardian and ward are the same, pro tempore, as that of a father and child; and therefore I shall not repeat them, but shall only add that the guardian, when the ward comes of age, is bound to give him an account of all that he has transacted on his behalf, and must answer for all losses by his wilful default or negligence. In order, therefore, to prevent disagreeable contests with young gentlemen, it has become a practice for many guardians, of large estates especially, to indemnify themselves, by applying to the Court of Chancery, acting under its direction, and accounting annually before the officers of that court. For the Lord Chancellor is, by right derived from the Crown, the general and supreme guardian of all infants, as well as idiots and lunatics; that is, of all such

persons as have not discretion enough to manage their own concerns. In case, therefore, any guardian abuses his trust, the court will check and punish him; and, sometimes, will proceed to the removal of him, and appoint another in his stead."

What is the obligation of a father touching the support of his child?

Walker, in his American Law (4th ed.), p. 258, said that there is no legal obligation at common law on the part of the father to support his infant children.

It is laid down in Blackstone, Book 1, p. 449, that "no person is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, either through infancy, disease, or accident, and then is only obliged (by 1 Anne, St. 1, ch. 30) to find them with necessaries, the penalty on refusal being no more than 20s. a month. For the policy of our laws, which are ever watchful to promote industry, did not mean a father to maintain his idle and lazy children in ease and indolence." See Ind. Dig. 492. But, see Reeves' Dom. Rel. 283. So, a step-father is not obliged to maintain the children which his wife may have had by a former husband. Note by Sharswood to 1 Black. Com. 449; Ind. Dig. 492; sections 2 and 3, Reeves' Dom. Rel. 285. The theory of the common law, then, its policy, is that children, when physically able are to support themselves by their own labor. Hence, the right on the part of the father, when he supports his child, to the earnings of such child, for a consideration of support. Hence, the rule that guardians should keep their wards employed in earning their own support, rather than to permit them to consume, in idleness, the principal of the patrimony.

But if the ward be physically unable to earn such support, or cannot do it without encroaching upon the time which should be devoted to acquiring a good English education, and the ward has property, the guardian may, and should if necessary encroach even on the principal of such property for the support and education of the child. Mr. Reeves, in his Domestic Relations, 324, says, "No guardian is bound to maintain his ward at his own expense, except he be the father; but whatever expense he is at for the ward's maintenance, the guardian shall be reimbursed out of the ward's estate." He further says, "the safest way for such guardian is for him to apply to Chancery

[or to the Probate Court], in the first instance, and procure the sanction of that court, for the expenditures he is about to make." See, also, 1 Black. Com. 462. But suppose he does not so apply, and makes expenditures for maintenance, without the previous direction of the court, can the court afterward allow them to be paid out of the principal of the ward's estate, if need be? The court will exercise great caution and scrutiny in allowing such expenditures to be charged upon the infant's estate. It may refuse the allowance. But it is in its power to make it, if it seems right so to do. This is settled in the matter of Bostwick, 2 John. Ch. 100, where Chancellor Kent states the history of the question, and the change of ruling upon it, in the English Chancery. See, also, other cases to the same point, in the 2d vol., pt. 2, of Leading Cases in Equity, 168; see, also, cases cited in Harring v. Coles, 2 Bradf. Sur. Rep. 349. Thus far we have examined the power of the guardian upon common law principles. It may be restricted by statutes. Has it been so restricted in this state? It had not, at the time the expenditures in this case were made, but had rather been enlarged. R. S. 1838, § 52, p. 103. Whether the power of a guardian or of the court had been restricted in later codes, we need not here inquire, though we are not aware of any such. It being, then, when the expenditures in this case were made by the guardian, a right possessed by him to make expenditures for the support of the ward, taking the risk of their allowance, as being reasonable, by the proper court; and the proper court having allowed them, after a jury had found them reasonable, this court could not disturb that allowance, where it would not set aside the verdict of a jury in other cases.

PER CURIAM. The judgment is affirmed, with costs.

LEADING ILLUSTRATIVE CASES LAW OF LANDLORD AND TENANT

CHAPTER I.

THE TENANCY.

Whether a Tenancy at Will or From Year to Year.[1] Effect of a Parol Lease.

TALAMO v. SPITZMILLER.

120 N. Y. 37, 23 N. E. 980. 1890.

BRADLEY, J. The action was brought to recover the proceeds of the sale made by the defendant of the plaintiff's goods. The defendant admits his liability to account to the plaintiff for the proceeds of such sale, and alleges several matters by way of counter-claim, which will be referred to so far as is essential to the determination of the questions presented for consideration on this review. The trial court found that on March 13, 1882, by an agreement of lease in writing under seal made by Catharine Dickman and defendant, she leased to him a dwelling-house for the term of five years from May 1, 1882, at the annual rent of $450 for the first year, and $500 for each subsequent year, payable in equal monthly installments in advance, which the defendant undertook to pay; that the defendant took such lease at the verbal instance and request of the plaintiff, and upon the unwritten understanding and agreement that they should jointly use and occupy the dwelling-house during the term mentioned in the lease, and that the plaintiff should pay to the defendant half the rent; that the defendant and the plaintiff went into the possession of the house in May, 1882, and jointly occupied it until in November following, when the plaintiff quit the house, and has not since

[1] And see Hunter v. Frost, 47 Minn. 1, 49 N. W. 327.

then occupied any portion of it; that the defendant has paid the monthly installments of rent as they fell due, and that the plaintiff has paid nothing to the defendant on account of the rent. The court allowed to the defendant, against the plaintiff, a sum equal to one-half the rent for the period of the joint occupancy—six and a half months. And upon the exception to the conclusion of the court that the plaintiff was entitled to recover the amount for which judgment was directed, arises the question whether the defendant was entitled to the allowance of a greater amount against the plaintiff than that given by the court on account of the rent. The contention of the defendant's counsel is: (1) That the plaintiff became liable to pay the defendant one-half the rent which the latter undertook by the lease to pay as the installments should become due; (2) that, if not so, the plaintiff became a yearly tenant, and was liable to the defendant for one-half the amount of the rent for one year. The plaintiff, not being a party to the lease, assumed no legal obligation to pay rent for the term, as a lease for more than one year, not in writing, was void. 2 Rev. St. 135, §§ 6, 8. The agreement between the parties, and under which the plaintiff entered into joint occupancy with the defendant, being void, gave to the plaintiff no right, and imposed upon the defendant no obligation, to permit him to go into or remain in possession of any portion of the house, and unless he became a yearly tenant his liability was for use and occupation for the time only which he occupied. Thomas v. Nelson, 69 N. Y. 118. The mere fact that a person goes into possession under a lease, void because for a longer term than one year, does not create a yearly tenancy. If he remains in possession with the consent of the landlord for more than one year, under circumstances permitting the inference of his tenancy from year to year, the latter could treat him as such, and the tenant could not relieve himself from liability for rent up to the end of the current year; and the terms of the lease, void as to duration of term, would control in respect to the rent. Coudert v. Cohn, 118 N. Y. —, ante, 298. The parol agreement for five years was not effectual to create a tenancy for one year. Nor did the mere fact that the plaintiff went into possession have that effect. He remained in occupation a part of one year only, and the creation of a tenancy for a year was dependent

upon something further. While it is not required that a new contract be made in express terms, there must be something from which it may be inferred—something which tends to show that it is within the intention of the parties. The payment and receipt of an installment or aliquot part of the annual rent is evidence of such understanding, and goes in support of a yearly tenancy, and, without explanation to the contrary, it is controlling evidence for that purpose. Cox v. Bent, 5 Bing. 185; Bishop v. Howard, 2 Barn. & C. 100; Braythwayte v. Hitchcock, 10 Mees. & W. 494; Mann v. Lovejoy, Ryan & M. 355; Thomas v. Packer, 1 Hurl. & N. 672; Doe v. Crago, 6 C. B. 90.

While there may appear to have been some confusion in the cases in this state upon the subject, this doctrine has been more recently recognized. Reeder v. Sayre, 70 N. Y. 184; Laughran v. Smith, 75 N. Y. 209. In the cases last cited the tenants had been in possession more than a year when the question arose, but, having gone into occupancy under an invalid lease, their yearly tenancy was held dependent upon a new contract, which might be implied from the payment and acceptance of rent, and, when once created, could be terminated by neither party, without the consent of the other, only at the end of a year. The contention, therefore, that by force of the original agreement between the parties, aided by the fact that the plaintiff went into the possession with the consent of the defendant, is not alone sufficient to support an inference of the new contract requisite to create a yearly tenancy. The plaintiff paid no rent, nor while he was in possession was any request of or promise by him made to pay any. He simply went in under the original void agreement, and left within the year. There was no evidence to require the conclusion of the trial court that the plaintiff had assumed any relation to the premises which charged him with liability, other than for use and occupation, during the time he remained in possession. The defendant's counsel, to support his proposition that the entry by the plaintiff with the consent of the defendant made him a yearly tenant, cites Craske v. Publishing Co., 17 Hun 319, where it was remarked that a parol lease for a longer term than one year "operated so as to create a tenancy from year to year." If that was intended by the learned justice

as a suggestion that such a void lease operated as a demise for one year, it is not in harmony with the view of the court in Laughran v. Smith, supra. That remark in the Craske Case was not essential to the determination there made, as rent was in fact paid for a portion of the term; nor can it be assumed that it was intended to have the import sought to be given to it. It must be assumed, upon authority and reason, that a parol lease for more than one year is ineffectual to vest any term whatever in the lessee named, and that when he goes into possession under it, with the consent of the lessor, without any further agreement, he is a tenant at will merely, subject to liability to pay at the rate of the stipulated rent as for use and occupation. Barlow v. Wainwright, 22 Vt. 88. This may be converted into a yearly tenancy by a new contract, which may be implied from circumstances, when they permit it. While the mere entry with consent will not alone justify it, a promise to pay, and a purpose manifested to accept, a portion of the annual rent provided for by the agreement may, as evidence, go in support of such a new contract. There was no such evidence in this case. The promise of the plaintiff to pay one-half the rent was made preliminarily to his entry, and was part of and not distinguishable from the parol agreement with the defendant to occupy for five years, and pay one-half the rent for that term. There does not seem to have been any evidence to require the conclusion that any other than such void agreement was made between the parties, or that the plaintiff became other than a mere tenant at will of the defendant. 1 Woodf. Landl. & Ten. (1st Amer. Ed. from 13th Eng. Ed.) 221. The other cases cited by the defendant's counsel do not support the proposition asserted by him. There is no opportunity, upon the facts found, or upon any, the finding of which the evidence requires, to hold that the defendant took and held the lease as trustee for the plaintiff as to a portion of the demised premises, or that a relation was assumed by the plaintiff to the lease, between the lessor and the defendant, which legally charged him with liability to the latter for moneys paid by him pursuant to it. The parol agreement between them was void and ineffectual for any such purpose. The judgment should be affirmed.

All concur.

CHAPTER II.

THE RELATION OF LANDLORD AND TENANT.

Whether the Relation Exists.

DAVIS v. WILLIAMS.

130 Ala. 530, 30 So. 488, 54 L. R. A. 749, 89 Am. St. Reps. 55. 1900.

Appeal from chancery court, Macon county; W. L. Parks, Chancellor.

Bill by J. L. Williams and George E. Salter against Mary C. Davis and Hubert T. Davis. Decree for complainants, and defendants appeal. Reversed.

The bill was filed to compel the specific performance of a contract which was made by R. T. Davis and Mary C. Davis with the Georgia & Alabama Construction Company, by which contract R. T. Davis and Mary C. Davis, his wife, agreed, upon certain conditions, to convey to the Georgia & Alabama Construction Company one-half interest in 40 acres of land in Macon county. The conditions of this contract, as stated in the opinion, were fulfilled, and the contract was assigned by the Georgia & Alabama Construction Company to the complainants. After the execution of the contract R. T. Davis died, and the title to the lands vested in his wife, Mary C. Davis, and Hubert T. Davis and Fort Davis, his children, who survived him. Mary C. Davis purchased the interest of Fort Davis, and at the time of the filing of the present bill she and Hubert T. Davis owned the lands as tenants in common. The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. On the submission of the cause on the pleadings and proof, the chancellor rendered a decree granting the relief prayed for, and directed the defendants to execute and deliver to the complainants a deed to a one-half interest in the lands in dispute.

TYSON, J. The bill in this case was filed by complainants, as owners of a certain contract by assignment, against the respondents, as successors in interest and title to the lands agreed to be conveyed, and seeks a specific performance of that contract. The contract was executed by R. T. Davis and Mary C. Davis, his wife, in which they agreed to convey by warranty deed a half interest in 40 acres of land, to be selected by the complainants' assignors, in a certain section owned by R. T. Davis. The consideration of this contract was that the complainants' assignors were to build the Savannah, Americus & Montgomery Railroad within one-half mile of the residence of the Davises, and to erect a depot within the same distance from their residence, at any point along the line of the road most suitable to themselves. The deed was to be executed as soon as the road was built, the depot established, and a train made a trip to Montgomery. The land agreed to be conveyed upon compliance with the conditions of the contract, and selected, was a part of a tract of land owned by him, comprising about 800 acres. R. T. Davis died shortly after entering into the contract, and after the selection of the land was made by complainants' assignors under it. He left surviving him his wife and two sons. His wife, who is one of the respondents, was at the date of the filing of the bill the owner of a two-thirds undivided interest in the entire tract; and Hubert T. Davis, a son, the other respondent, was the owner of the remainder. The evidence shows without dispute that the road was built, the depot established, a train ran through to Montgomery, and the land selected during the year 1891. In other words, complainants' assignors had performed their obligation under the contract, and were entitled to a deed from the respondents during the year 1891. On April 20, 1896, the complainants by purchase became the owners of this contract, and by virtue of that ownership were entitled to a deed from the respondents.

One of the defenses invoked by the answer of the respondents is that complainant Williams for a period of about two years before the filing of this bill, at the date of its filing, and for one year subsequent thereto, tenanted and dwelt on a part of the lands in controversy. It appears from the evidence that Williams in 1892 built a house for the respondents upon

the land in controversy, which he occupied while "looking after the business" for them, until December, 1896, from which last-named date he paid rent for this house at the rate of five dollars per month for one year, and four dollars per month for eight months, ceasing to pay rent in August, 1898. The bill was filed on the 11th of February, 1897. It will be noted that when this bill was filed, and after the complainant Williams had become the owner of the contract, and after he became entitled to a deed to the lands from the respondents, he rented a part of the lands, and became the tenant of one of the respondents. His occupancy of the house which is situated upon the lands in controversy, for looking after the business of the respondents, prior to December 2, 1896, when he commenced to pay rent therefor, did not create the relation of landlord and tenant. That relation was simply that of employer and employee or master and servant, and the occupancy of the house was a part merely of the contract for service, and operated as a portion of the consideration of that agreement. People v. Annis, 45 Barb. 304; Wilber v. Sisson, 53 Barb. 258; Haywood v. Miller, 3 Hill 90; Kerrains v. People, 60 N. Y. 221, 19 Am. Rep. 158; Doyle v. Gibbs, 6 Lans. 180; Bowman v. Bradley, 151 Pa. 351, 24 Atl. 1062, 17 L. R. A. 213; McQuade v. Emmons, 38 N. J. Law 397; School Dist. v. Batsche, 106 Mich. 330, 64 N. W. 196, 29 L. R. A. 576; East Norway Lake Church v. Froislie, 37 Minn. 447, 35 N. W. 260; White v. Bayley, 10 C. B. (N. S.) 227.

The relation of landlord and tenant arose in December, 1896, which, as we have shown, was after Williams became entitled to a deed from the respondents to the land. We have the question presented as to whether Williams, being the tenant of one of the respondents at the time of the filing of the bill, and being the owner of the contract at the time he entered into that relation, can maintain the bill to require a specific performance of that contract. There is not an intimation that there was any understanding or agreement that his rental contract was subject to his right to have the contract of purchase of which he was part owner enforced, or that his landlord ever at any time in any way recognized his rights under that contract, or obligation under it to make a deed to him. It is a principle universally recognized and enforced by courts of law that a tenant is estopped to dispute the title of his landlord,

unless his landlord's title has expired or been extinguished, either by operation of law or his own act, after the creation of the tenancy. It is only when there is a change in the condition of the landlord's title for the worse after the tenant enters into his contract, in the absence of fraud or mistake of fact, that he is permitted to show the change in the condition of the title. Under no circumstances, when there is no fraud or mistake of fact, will it be permitted to deny the title of the landlord at the beginning of his term. This doctrine has been enforced by this court from its earliest history. Randolph v. Carlton, 8 Ala. 606; Pope v. Harkins, 16 Ala. 321; Rogers v. Boynton, 57 Ala. 501; Farris v. Houston, 74 Ala. 162; Robinson v. Holt, 90 Ala. 115, 7 South. 441; Barlow v. Dahm, 97 Ala. 415, 12 South. 293, 38 Am. St. Rep. 192; Pugh v. Davis, 103 Ala. 316, 18 South. 8, 49 Am. St. Rep. 30. In 2 McAdam, Landl. & T. p. 1341 et seq., this doctrine is stated in this language: "For reasons of public policy a tenant is never allowed to dispute his landlord's title after having accepted possession under him. This rule is elementary. The estoppel extends equally to landlord and tenant, so that, while the tenant is estopped from denying the landlord's title, the landlord cannot allege that he had no title at the time of the demise. Where a tenant enters into possession under a lease, he is estopped from denying the title of his landlord. The tenant must surrender the possession to the landlord before he can assail or question the title under which he entered. * * * 'He can no more show that the premises belonged to the state than he can that they belonged to himself. He must first restore the possession which he obtained from his landlord, and then, as plaintiff, he may avail himself of any title which he has been or may be able to acquire.' 'The foundation of the estoppel is the fact of the one obtaining possession and enjoying possession by the permission of the other. And so long as one has this enjoyment he is prevented by this rule of law from turning round and saying his landlord has no right or title to keep him in possession.' * * * No dispute as to the title will be tolerated until the parties are placed in their original position. * * * Nor can he be heard to deny the title of his landlord, nor can he rid himself of such relation, without a complete surrender of the possession of the land. To allow him to agree and pro-

fess to hold possession under one as landlord, and at the same time to hold covertly for himself, or for another's advantage, would be to encourage and uphold a gross fraud, which the law will never do." Continuing, the author says: "He must first surrender up the premises to his landlord before assuming an attitude of hostility to the title or claim of title of the latter."

* * * * * * * * *

No Contract to Pay Rent. Tenant's Liability for Use and Occupancy.

STORY v. McCORMICK.

70 Kan. 323, 78 Pac. 819. 1904.

Error from District Court, Geary County; O. L. Moore, Judge.

Action by Mary G. McCormick against A. M. Story, administrator. Judgment for plaintiff, and defendant brings error. Reversed.

MASON, J. In January, 1892, Mary G. McCormick, 14 years of age, lived with her mother upon a tract of ground containing 11 acres, which she owned, having inherited it from her father. In that month her mother was married to William Worrell. From the time of the marriage Worrell and his wife lived upon the land referred to, Mary McCormick living with them. This situation continued until a little after April 30, 1901, when Worrell moved from the land, Miss McCormick having written him a letter in effect asking payment of rent for the time he had occupied it. Shortly afterward he died, and, an administrator having been appointed, Miss McCormick filed a claim against the estate for rent from January, 1892. The claim was allowed by the probate court, and an appeal was taken to the district court. A jury trial resulted in a judgment for the claimant in the sum of $638 for the use of the property from the time she attained her majority, the court by its instructions having limited the recovery to that period. From this judgment the administrator prosecutes error.

The principal question presented is whether the evidence in behalf of plaintiff was sufficient to take the case to the jury.

The facts shown, so far as necessary to the decision of this question, were substantially as follows: The land was situated about half a mile from the railroad station of Zeandale. It included alfalfa ground, pasture, orchard, and garden. The improvements included an eight-room dwelling house, a barn, and other outbuildings. The rental value was estimated by the witnesses at from $10 to $14 a month. Plaintiff lived with her mother and stepfather as one of the family during the period in question, except for about 18 months, during which time she was absent at school and on visits. She paid the taxes, insurance, and cost of painting and other repairs. She paid no board. She occupied exclusively one room. She and her mother did all the housework while she was at home. During several years a nephew of Worrell also formed a part of the family. At one time during plaintiff's minority two rooms were occupied by a Mr. Coons, and rent for them was paid to her guardian. Practically, but not absolutely, all the produce of the place was used there. Some of it was marketed. Upon one occasion a small amount of fruit was sold, and the money given to plaintiff. Worrell took charge of and managed the property. He supplied the table for the family, but contributed nothing to the support or to the expense of plaintiff when she was away from home. A corn crib on the place was used by him each year for storing alfalfa. Upon one occasion plaintiff wished to use it for some of her own corn, raised elsewhere, but he said that he would rather pay her $5 than have this done, and did so, continuing to use the crib himself. The stock kept upon the place included two horses belonging to Worrell, one belonging to Mrs. Worrell, and for a part of the time one belonging to plaintiff. There was no agreement, oral or written, for the payment of rent, and had never been any talk about it. Plaintiff never made any claim for rent until the writing of the letter already mentioned. She testified, however, that she always expected to receive payment from her stepfather for the use of the property.

Plaintiff's claim for rent is not based upon the theory that there was an understanding between her and the defendant's decedent for its payment—that an implied contract existed that differed from an express contract only in that it required to be proved inferentially by circumstantial evidence instead of directly by positive testimony. She rests her claim upon a

quasi-contract, or contract implied in law, as distinguished from a contract implied in fact. Her contention is that the law imposed the obligation to pay rent, irrespective of the intentions of her stepfather in the matter. As is said in Keener on Quasi-Contracts (page 5): "The term 'contract implied in law' is used, however, to denote, not the nature of the evidence by which the claim of the plaintiff is to be established, but the source of the obligation itself. It is a term used to cover a class of obligations where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and in many cases in spite of his actual dissent." See, also, 15 A. & E. Encycl. of L. (2d ed.) 1078.

It is the contention of the administrator (the plaintiff in error) that the relation of landlord and tenant did not exist, either in virtue of any understanding of the parties or of an obligation imposed by law; that the evidence, showing, as it does, that the plaintiff was a member of the family that occupied the premises, is inconsistent with such a relation. Reliance is placed upon a series of Kansas cases, of which Ayres v. Hull, 5 Kan. 419, is the earliest. It is there said: "It may be stated, as a general principle of almost universal application, that when one person does work for another, with the knowledge and approbation of that other, the law will imply a promise on the part of the person benefited thereby to make a reasonable compensation therefor. But if the relation of the parties is such as to show some other inducement than a pecuniary one for the labor, then the law will not imply a promise to pay for such services. * * * So many considerations, other than those of a mere pecuniary character, enter into the minds of persons closely related in making up the family, that it would be both violent and dangerous to infer a promise from the kindly and sociable acts growing out of such relations. The family relations are too sacred to be invaded and disturbed by presumptions of law that are reasonable and proper when applied to the acts of strangers."

The statute (§ 3864, Gen. St. 1901) provides that "the occupant without special contract, of any lands, shall be liable for the rent to any person entitled thereto." The evidence is capable of an interpretation showing such an occupancy of plain-

not, that plaintiff expected to receive rent, and that, in view of the conduct and relations of the parties and the circumstances proved upon the trial, Worrell did not have good reason to believe that he was not to pay rent. In this no error is perceived. * * *

CUNNINGHAM, GREENE, and ATKINSON, JJ., concurring.

JOHNSTON, C. J. I concur in the reversal of the judgment, but dissent from the view that a liability for rent was shown, and also that mere occupation of premises implies a promise to pay rent. The plaintiff, her mother and stepfather constituted a family, and together occupied the premises. There was no agreement that rent should be paid, and none was ever claimed or demanded until the family relation was ended. There is no liability to pay rent unless the relation of landlord and tenant existed. It did not exist unless it was based upon a mutual intention to form that relation, and there must have been an agreement, either express or implied. It will never be implied where the conduct and relations are inconsistent with its existence. Where the family relation exists, as it did here, it is well settled in Kansas that one member of a family has no right of action against another for wages on one side, nor on the other side for board or lodging. Neither is there a right of action for anything furnished by one to the other as a member of the family, unless there is an express contract that such payment is to be made. Ayers v. Hull, 5 Kan. 419; Greenwell v. Greenwell, 28 Kan. 675; Ensey v. Hines, 30 Kan. 704, 2 Pac. 861; Shane v. Smith, 37 Kan. 56, 14 Pac. 477; Wyley v. Bull, 41 Kan. 206, 20 Pac. 855; Collyer v. Collyer, 113 N. Y. 442, 21 N. E. 114; Tinder v. Davis, 88 Ind. 99; Gorrell v. Taylor (Tenn.) 64 S. W. 888; Fleming v. Hughes (Miss.) 6 South. 842; 1 Beach on Contracts, 775. Within the rule of these cases, no liability for rent was shown, and the jury should have been so advised.

SMITH, J., concurring with views expressed by JOHNSTON, C. J. BURCH, J., not sitting, having been of counsel in the subject-matter of the action.

CHAPTER III.

LEASES.

What Constitutes a Lease. Contract in Writing.

BAER v. MINOCK.

128 Mich. 676, 87 N. W. 1045. 1901.

Action by John D. Baer against John K. Minock. From a judgment in favor of defendant, plaintiff brings error. Reversed.

MOORE, J. The plaintiff advertised his store building in Detroit for rent. The defendant replied thereto by letter. As a result, Mr. Minock came to Detroit, looked over the premises, and with Mr. Baer drove around the vicinity of the store, and after some conversation, according to the claim of the plaintiff, offered him $10 "for the rent of the building at twenty-five dollars a month for the first six months, payable in advance," providing that plaintiff build a barn on the premises for use in the hay and feed business, which Mr. Minock contemplated conducting in connection with a meat and grocery store, which offer was accepted by Mr. Baer, who sent Mr. Minock a letter the following day (April 21, 1900) stating the terms of the agreement in accordance with their conversation, in which it was stated, "Herewith please find receipt for advance rent on room 686 Third Ave., beginning May 1st, 1900; rent $25 per month, first six months." It also contained information concerning the building of the barn. Mr. Minock replied thereto by letter dated April 24, 1900, in which it was stated: "All right. I am loading two cars with hay and produce, and will be in Detroit as quick as I can." Mr. Minock went into possession, and paid $25 in advance for the rent of the building, and before June 1st vacated the store, and left the keys at the baker's shop, next door. Mr. Baer did not accept the surrender of the premises, but demanded the rent of Mr. Minock

for each month as it accrued. He refused payment, and Mr. Baer commenced suit in justice's court July 11, 1900, to recover the accrued rent. The case was appealed to the circuit court, where a jury rendered a verdict in favor of defendant. Plaintiff brings error.

We do not deem it necessary to discuss all the assignments of error, as a disposition of one of them disposes of the case. The court was asked to charge the jury that the contract was in writing, but declined to do so. He said to the jury: "About the only thing for you to decide in this case is what the contract between the parties respecting the leasing of the premises on Third avenue was. You have heard the testimony in this case, and it appears from the testimony of both that they met here in the city of Detroit, and that Mr. Minock and Mr. Baer went up to the premises and drove around the surrounding streets, or the streets in the immediate vicinity; that when they parted Mr. Minock at that time paid him ten dollars upon the lease of the premises. Their stories did not agree as to what the lease was. Mr. Baer tells you it was a lease for six months; Mr. Minock tells you it was simply a lease from month to month; and it is for you, I think, to decide which is correct. Now, after they separated, Mr. Baer wrote this letter, which I will read as far as is essential, though I shall not read the entire letter: 'Detroit, Mich., April 21, 1900. J. K. Minock, Esq.—Dear Sir: Herewith please find receipt for advance rent on room No. 686 Third avenue, beginning May 1st, 1900; rent $25 per month, first six months.' On the 24th of April Mr. Minock answered the letter as follows: 'Dear Sir: I received your letter. All is right. I am loading two cars with hay and produce, and will be at Detroit as quick as I can.' Now, these letters, together with the conversation they had, I think, constitute all the evidence from which you are to deduce the terms of the contract between them. You may consider these letters as bearing upon the question. If it were not for the fact that I believe 'rent $25 per month, first six months,' is ambiguous, I think it would be doubtless true that the contract would exist in writing; but I am not prepared to say to you that 'rent $25, first six months,' relates to the term for which the premises were leased. You may find that it does so relate to the term, and you may find from the oral contract, from the testimony

of Mr. Baer, and from this letter and the answer, 'All is right,' that it was for six months; but I do not think that the phrase 'rent $25 per month, first six months,' necessarily refers to the term. It may be expressive of the rent alone; that is to say, you may find that the rent was payable at $25 per month, and was to continue for six months if he stayed that length of time." We cannot agree with the learned circuit judge that there is anything ambiguous about this correspondence. The defendant says he does not remember getting the letter of April 21st, but does not deny getting it, and clearly the letter of April 24th is in answer to it. The construction of the contract was for the court, and not for the jury. Battershall v. Stephens, 34 Mich. 68; Wagner v. Egleston, 49 Mich. 218, 13 N. W. 522; Brown v. Schiappacasse, 115 Mich. 47, 72 N. W. 1096; Ranney v. Higby, 5 Wis. 62; Scanlan v. Hodges, 3 C. C. A. 113, 52 Fed. 354. Under the proofs the plaintiff was entitled to an instruction to the jury that he was entitled to recover two months' rent. Scott v. Beecher, 91 Mich. 594, 52 N. W. 20.

Judgment is reversed, and new trial ordered.

GRANT, J., did not sit. The other justices concurred.

Oral Agreement. Statute of Frauds. Action for Rent.

MATTHEWS v. CARLTON.

189 Mass. 285, 75 N. E. 637. 1905.

Appeal from Superior Court, Worcester County.

Action of contract by Robert F. Matthews against Herbert E. Carlton. Judgment was rendered for defendant upon agreed facts, and plaintiff appealed. Affirmed.

KNOWLTON, C. J. This case comes before us on an agreed statement of facts, by which it appears that, in the early part of June, 1904, the defendant "orally agreed to hire a tenement of the plaintiff * * * at $25 per month, beginning on the 1st day of July, 1904." The tenement was then occupied by a tenant, who was to hold it until July 1, 1904, and who paid the plaintiff his rent up to that date. With the consent of this tenant, who was then occupying the tenement, the defendant

moved a part of his goods into the tenement. The tenant afterwards moved out, and the defendant moved other goods in, but subsequently, before the 1st day of July, moved all the goods out and notified the plaintiff that he should not take the tenement. The question is whether the defendant is liable to the plaintiff for rent for the month of July. His moving a part of his goods into the house in June, with the consent of the tenant then in possession, and his subsequent removal of them before the expiration of the term of the tenant, does not affect his rights. He was not in possession under his contract with the plaintiff, and he never became a tenant of the plaintiff. He never entered under his agreement, but, on the contrary, before the time when his term was to begin he gave the plaintiff notice that he should not enter.

By Rev. Laws, c. 127, § 3, it is provided that an estate or interest in land, created without an instrument in writing signed by the grantor or his attorney, shall have the force and effect of an estate at will only, and that "no estate or interest in land shall be assigned, granted, or surrendered, unless by such writing or by operation of law." The oral agreement, therefore, gave the defendant no estate or interest in the land, and under this section, as well as under Rev. Laws, c. 74, § 1, cl. 4, no action could be maintained for the enforcement of it.

The plaintiff's declaration contains two counts—one for so-called rent or for use and occupation, and the other for damages for a breach of the oral agreement. The first count cannot be maintained, because the relation of landlord and tenant never existed between the parties. The defendant declined to become the plaintiff's tenant before the time fixed for the beginning of the term. There can be no liability of this kind without an occupation by a tenant, actual or constructive, as well as a contract, express or implied. Rogers v. Coy, 164 Mass. 391, 41 N. E. 652; Bacon v. Parker, 137 Mass. 309-312; Central Mills v. Hart, 124 Mass. 123; Leonard v. Kingman, 136 Mass. 123; Merrill, Adm. v. Bullock, 105 Mass. 486; Eastman v. Anderson, 119 Mass. 526-531; Larkin v. Avery, 23 Conn. 304. The second count is upon an agreement which is within the Statute of Frauds. Rev. Laws, c. 74, § 1, cl. 4; White v. Wieland, 109 Mass. 291; Parker v. Tainter, 123 Mass. 185.

Judgment for the defendant.

CHAPTER IV.

CONDITIONS, RESERVATIONS AND EXCEPTIONS.

Conditions Precedent Distinguished from Conditions Subsequent.

FRANK v. STRATFORD-HANDCOCK.

13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, 110 Am. St. Rep. 963. 1904.

POTTER, J. * * * Conditions precedent are to be strictly complied with. Such a condition is one that must happen or be performed before the estate dependent upon it can arise or be enlarged, while a condition subsequent defeats the estate in case it does not happen or is not performed. In determining whether a particular provision amounts to a condition or not, the rule is that the intention of the grantor governs. Such intention is to be gathered from the whole instrument and the existing facts. The authorities lay down the principle that whether a condition is precedent or subsequent depends upon the intent of the parties, as collected from the whole contract, whatever the order in which they are found, or the manner in which they are expressed, although certain words are customary when a condition rather than a covenant is intended. But it seems that the same words may be employed to create either a covenant or a condition. The words employed in the beginning of the instrument are words of present demise. It reads: "This article of agreement, made and entered into this 4th day of April, 1901, by and between Abe Frank, party of the first part, and S. Henrietta Carlile-Kent, party of the second part, witnesseth: That the party of the first part has this day leased to the party of the second part the following described lands [description] for a term of six months from April 1, 1901, and the party of the second part agrees to pay as rental of said premises the taxes on the same for the current year 1901." Then follows the clause giving the privilege of purchase, and

following that are the other agreements as to the use of the premises, and the instrument then concludes with the agreement for the deposit that is quoted in an earlier part of this opinion.

The deposit was required for a specified purpose, viz., to secure the faithful performance by plaintiff, the lessee, of the lease, and the payment of the taxes. She had agreed to keep the fences and buildings in repair, to refrain from pasturing stock upon certain designated lands, and to limit her use of the premises in other respects; and the only rental was to be taxes for the year, and a certain portion of the crops, should she not exercise the option of purchase. Now, we know, as the parties doubtless also knew, that the taxes would not become due or payable until a very short time before the expiration of the lease. The statutes require the tax list to go into the hands of the collector by the third Monday of September, and the taxes would not become delinquent until the last day of December. Indeed, the amount of the taxes could not have been ascertained until September. Here, then, is to be perceived a substantial reason for the requirement of security in advance. A reason is also to be found in the nature of the covenants of the plaintiff respecting the use to be made of certain parts of the premises, as well as to the keeping of the improvements in repair. This would all indicate that the agreement for the security was intended as a condition, rather than a mere covenant. Moreover, as a covenant, it would have added nothing substantially to the contract. The damages that might be recovered upon its breach could not have exceeded the damages sustained by a breach of the covenants which it was intended to secure; and those damages would be as capable of recovery by assigning and proving a breach of the principal covenants. The very nature of the provision would seem to stamp it as a condition precedent. There would be little necessity for requiring security by a deposit of money after the time for performance of the lease had expired, and the lessee had enjoyed on her part all its benefit. As no time for making the deposit was stated, doubtless a reasonable time would be implied, and, had the lessee been out of possession, a tender of the security and demand for possession within a reasonable time might no doubt have entitled her to possession under the lease. But no such question arises here. It was clearly proven, and so found by the court, that she was in

possession at and prior to the making of the contract. There is nothing in the evidence to show that Frank did any act toward placing her in possession; nor is the title or right under which she had been in possession disclosed, except, perhaps, it may be inferred from a circumstance to which we shall have occasion to refer. There is no question of waiver of the condition which we are permitted to consider. The pleadings set out a full compliance with all conditions; and the judgment of the court was based upon a finding that they had been substantially complied with. * * *

CHAPTER V.

COVENANTS.

No Implied Covenant That an Unfurnished Dwelling Is Fit for Habitation.

DALY v. WISE.

132 N. Y. 306, 30 N. E. 837. 1892.

Appeal from common pleas of New York city and county, general term.

Action by Maria L. Daly against John S. Wise to recover rent. Plaintiff obtained judgment, which was affirmed by the general term. Defendant appeals. Affirmed.

The other facts fully appear in the following statement by FOLLETT, C. J.:

September 27, 1888, the litigants entered into a written lease by which the plaintiff let to the defendant an unfurnished dwelling, known as "334 West Fifty-Eighth Street," in the city of New York, for one year from October 15, 1888, for $1,800, payable $150 October 15, 1888, and a like sum on the 15th day of each succeeding month. The lease contained no covenant in respect to the then condition of the house, nor that the lessor should put or keep it in repair. November 15, 1888, the defendant began to occupy the premises, paid the rent for four months, until January 15, 1889, and continued in occupation until February 2, 1889, when he abandoned them because of their unsanitary condition, arising from defective plumbing. February 4, 1890, this action was begun to recover the sums due by the terms of the lease on the 15th day of February, March, April, and May, 1889, $600 in all, with interest. The defendant answered that he was induced to enter into the lease by the oral representation of the plaintiff's agent "that the building on said premises was properly constructed and in thorough repair, the more especially in the matter of plumbing and sanitary arrangements; and that this defendant signed

said lease, relying upon the faith of said representation so made as aforesaid." It was also alleged: "That, when defendant entered into possession of said premises, it was discovered that said representations were untrue, and that said premises were unfit for the purposes of a residence, in that there existed hidden defects in the plumbing and construction of the sewer and other pipes, and the sanitarian arrangements in the buildings thereon. That such defects were concealed from view, and were not discovered until the effect thereof became apparent in the health of the defendant's family. That by reason of said defects the said building became charged with sewer gas and other foul and poisonous odors, thereby causing the defendant, his wife, children, and servants, to become sick, and in great danger of death; and they so continued sick and in danger until the defendant was evicted from said premises, as hereinafter set out." At the close of the evidence, neither party asked to have any question of fact submitted to the jury, but each moved that a verdict be directed in his or her favor. The defendant's motion was refused, and he excepted; but the plaintiff's motion was granted, and the defendant again excepted. No other exceptions are contained in the record, and the only questions reviewable in this court are those presented by the two exceptions mentioned. A judgment was entered on the verdict for the plaintiff, which was affirmed at general term. No opinion was written, but the case was decided upon the opinion of the same court in another action, arising over the same lease. 7. N. Y. Supp. 902.

FOLLETT, C. J. (after stating the facts.) In case neither party requests to have any question of fact submitted to the jury, but each asks that a verdict be directed in his favor, the court is authorized to determine the fact in issue; and upon appeal the disputed facts are deemed to have been determined in favor of the party for whom the verdict is directed. Kirtz v. Peck, 113 N. Y. 222, 21 N. E. Rep. 130; Dillon v. Cockroft, 90 N. Y. 649; Provost v. McEncroe, 102 N. Y. 650, 5 N. E. Rep. 795. This case must be determined upon the theory that all the disputed facts have been found in favor of the plaintiff.

In case the whole of an unfurnished dwelling is leased for a definite term, under a single contract, which contains no cove-

nant that the premises are in good repair, or that the lessor will put or keep them so, the law does not imply a covenant on the part of the lessor that the dwelling is without inherent defects, rendering it unfit for a residence. Franklin v. Brown, 118 N. Y. 110, 23 N. E. Rep. 126. In Smith v. Marrable, 11 Mees. & W. 5, a contrary rule was laid down by Baron Parke. That case arose out of a contract to let a furnished dwelling for six weeks at eight guineas per week. The tenant moved in, but found the house so infested with bugs that it was uninhabitable, and at the end of the first week left, paying the rent for that week. In an action brought, it was held, in the opinion delivered by Baron Parke, concurred in by Barons Alderson and Gurney, "that if the demised premises are incumbered with a nuisance of so serious a nature that no person can reasonably be expected to live in them the tenant is at liberty to throw them up. This is not the case of a contract on the part of the landlord that the premises were free from this nuisance. It rather rests in an implied condition of law, that he undertakes to let them in a habitable state." Chief Baron Abinger concurred upon the ground that "a man who lets a ready-furnished house surely does so under the implied condition or obligation—call it which you will—that the house is in a fit state to be inhabited." The opinion of Baron Parke was rested on the authority of Edwards v. Etherington, Ryan & M., 268, 7 Dowl. & R. 117, and Collins v. Barrow, 1 Moody & R. 112, both of which cases, together with Salisbury v. Marshal, 4 Car. & P. 65, are expressly overruled by Hart v. Windsor, 12 Mees. & W. 68, in which Parke, B., said: "We are under no necessity of deciding in the present case whether that of Smith v. Marrable be law or not. It is distinguishable from the present case on the ground on which it was put by Lord Abinger, both on the argument of the case itself, but more fully in that of Sutton v. Temple, 12 Mees. & W. 52, for it was the case of a demise of a ready-furnished house for a temporary residence at a watering place. It was not a lease of real estate, merely. But that case certainly cannot be supported on the ground on which I rested my judgment." Smith v. Marrable was decided at Hilary term, 1843, and Hart v. Windsor and Sutton v. Temple at Michaelmas term of the same year. The rule laid down in Smith v. Marrable by Abinger, C. B., as applicable to furnished houses, has been fol-

lowed in Campbell v. Lord Wenlock, 4 Fost. & F. 716, and Wilson v. Hatton, 2 Exch. Div. 336, but the rule as stated by Parke, B., has not been followed in England or in this state. Franklin v. Brown, 118 N. Y. 110, 23 N. E. Rep. 126. The defendant cannot escape liability for rent on the ground that the law implied a covenant that the dwelling was fit for habitation.

Is the evidence contained in the record sufficient to have required the trial court to have held, as a matter of law, that the plaintiff fraudulently represented that the dwelling and its fixtures were in good condition, or that she fraudulently concealed from the plaintiff the fact that it was in an unsanitary condition? In case the owner of a dwelling knows that it has secret defects and conditions rendering it unfit for a residence, and fraudulently represents to one who becomes a tenant that the defects and conditions do not exist, or if he fraudulently conceals their existence from him, the lessee, if he abandons the house for such cause, will not be liable for subsequently accruing rent. Wallace v. Lent, 1 Daly, 481; Jackson v. Odell, 12 Daly, 345; Rhinelander v. Seaman, 13 Abb. N. C. 455; Cesar v. Karutz, 60 N. Y. 229. In the case at bar the defendant testified, and in this he was not contradicted, that, when he first went to the house with the plaintiff's agent, he said: "I complained to him [the agent] at the time that I thought some of the plumbing looked old. He said that Mrs. Daly was very stiff,—determined not to put in any new; that it was all in good condition; that they had fixed it as they thought it ought to be." This is the only representation which was made by the plaintiff or her agent in respect to the sanitary condition of the dwelling. It was not shown that the plaintiff or the agent knew that the representations were false, or that the plumbing was out of order, and fraudulently concealed the fact. This takes the case out of the rule above referred to, in respect to the owner's liability in case he fraudulently misrepresents the condition of the dwelling, or, knowing that it is in bad condition, fraudulently conceals the fact from the person who becomes the lessee. Is the plaintiff liable for having stated that a material fact existed which did not exist, i. e., that the plumbing was in good order, upon the theory that she was bound to know whether or not the statement was true? In case a party, for the purpose of inducing another to contract with him, states,

on his personal knowledge, that a material fact does or does not exist, without having knowledge whether the statement is true or false, and without having reasonable grounds to believe it to be true, he is liable in fraud, if the statement is relied on, and is subsequently found to be false, although he had no actual knowledge of the untruth of the statement. Bennett v. Judson, 21 N. Y. 238; Marsh v. Falker, 40 N. Y. 562; Oberlander v. Speiss, 45 N. Y. 175; Wakeman v. Dalley, 51 N. Y. 27; 2 Pom. Eq. Jur. §§ 887, 888; Story, Eq. Jur. § 193. It does not appear that the plumbing had not been fixed as stated, nor that the statement that "it was all in good condition" was made without actual or supposed knowledge of its condition, nor that it was made in bad faith; and we think the case does not fall within the principle of the authorities last cited. The defendant cannot escape liability on the ground that the statement of the agent amounted to a warranty, because it is not so pleaded in the answer. The judgement should be affirmed, with costs.

All concur.

Lease of Furnished Rooms. Implied Covenant That They Are Fit for Immediate Habitation.

INGALLS v. HOBBS.

156 Mass. 348, 31 N. E. 286. 1892.

Appeal from superior court, Suffolk county.

Action by Sarah P. Ingalls and others against Warren D. Hobbs to recover rent for a dwelling house. Defendant had judgment on an agreed statement of facts, and plaintiffs appeal. Affirmed.

KNOWLTON, J. This is an action to recover $500 for the use and occupation of a furnished dwelling house at Swampscott during the summer of 1890. It was submitted to the superior court on what is entitled an "agreed statement of evidence," by which it appears that the defendant hired the premises of the plaintiffs for the season, as a furnished house, provided with beds, mattresses, matting, curtains, chairs, tables, kitchen utensils, and other articles which were apparently in

good condition, and that when the defendant took possession it was found to be more or less infested with bugs, so that the defendant contended that it was unfit for habitation, and for that reason gave it up, and declined to occupy it. The agreed statement concludes as follows: "If, under the above circumstances, said house was not fit for occupation as a furnished house, and, being let as such, there was an implied agreement or warranty that the said house and furniture therein should be fit for use and occupation, judgment is to be for the defendant, with costs. If, however, under said circumstances, said house was fit for occupation as a furnished house, or there was no such implied agreement or warranty, judgment is to be for the plaintiffs in the sum of $500, with interest from the date of the writ, and costs."

Judgment was ordered for the defendant, and the plaintiffs appealed to this court.

The agreement of record shows that the facts were to be treated by the superior court as evidence from which inferences of fact might be drawn. The only "matter of law apparent on the record" which can be considered as an appeal in a case of this kind is the question whether the judgment is warranted by the evidence. Pub. St. c. 152, § 10; Rand. v. Hanson, 154 Mass. 87, 28 N. E. Rep. 6; Mayhew v. Durfee, 138 Mass. 584; Railroad Co. v. Wilder, 137 Mass. 536; Hecht v. Batcheller, 147 Mass. 335, 17 N. E. Rep. 651; Fitzsimmons v. Carroll, 128 Mass. 401; Charlton v. Donnell, 100 Mass. 229. The facts agreed warrant a finding that the house was unfit for habitation when it was hired, and we are therefore brought directly to the question whether there was an implied agreement on the part of the plaintiff that it was in a proper condition for immediate use as a dwelling house. It is well settled, both in this commonwealth and in England, that one who lets an unfurnished building to be occupied as a dwelling house does not impliedly agree that it is fit for habitation.

Dutton v. Gerrish, 9 Cush. 89; Foster v. Peyser, Id. 242; Stevens v. Pierce, 151 Mass. 207, 23 N. E. Rep. 1006; Sutton v. Temple, 12 Mees. & W. 52; Hart v. Windsor, Id. 68. In the absence of fraud or a covenant, the purchaser of real estate, or the hirer of it for a term, however short, takes it as it is, and determines

for himself whether it will serve the purpose for which he wants it. He may, and often does, contemplate making extensive repairs upon it to adapt it to his wants. But there are good reasons why a different rule should apply to one who hires a furnished room, or a furnished house, for a few days, or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than when there is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well-understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use.

It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine caveat emptor, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time. This distinction between furnished and unfurnished houses in reference to the construction of contracts for letting them, when there are no express agreements about their condition, has long been recognized in England, where it is held that there is an implied contract that a furnished house let for a short time is in proper condition for immediate occupation as a dwelling. Smith v. Marrable, 11 Mees. & W. 5; Wilson v. Hatton, 2 Exch. Div. 336; Warehouse Co. v. Carr, 5 C. P. Div. 507; Sutton v. Temple, ubi supra; Hart v. Windsor, ubi supra; Bird v. Lord Greville, 1 Cababe & E. 317; Charsley v. Jones, 53 J. P. Q. B. 280. In Dutton v. Gerrish, 9 Cush. 89, Chief Justice Shaw recognizes the doctrine as applicable to furnished houses; and in Edwards v. McLean, 122 N. Y. 302, 25 N. E. Rep. 483; Smith v. Marrable, and Wilson v. Hutton, cited above, are referred to with approval, although held inapplicable to the question then before the court. See Cleves v. Willoughby, 7 Hill, 83; Franklin v. Brown, 118 N. Y.

110, 23 N. E. Rep. 126. We are of opinion that in a lease of a completely furnished dwelling house for a single season at a summer watering place there is an implied agreement that the house is fit for habitation, without greater preparation than one hiring it for a short time might reasonably be expected to make in appropriating it to the use for which it was designed.

Judgment affirmed.

CHAPTER VI.

FIXTURES.

General Nature of Fixtures. Rules for Determining. Tenant's Fixtures Distinguished from Fixtures as Between Vendor and Vendee. Electric Light Fixtures.

CANNING v. OWEN.

22 R. I. 624, 48 Atl. 1033, 84 Am. St. Rep. 858. 1901.

Action by Letitia A. Canning against Ellen I. Owen and others. Judgment was rendered for plaintiff, and defendants filed a petition for a new trial. Petition granted.

TILLINGHAST, J. One of the grounds of the defendants' petition for a new trial is that the trial court allowed testimony to be introduced by the plaintiff as to the conversion by defendants of certain electric light fixtures which had been attached to the Lake View Hotel property by plaintiff while she owned the same, and which fixtures, at the time they were so attached, were intended by the plaintiff to be and remain a part of the real estate. She did not detach, or attempt to detach, said fixtures until some time after the hotel property was sold under the mortgage thereof given by her. The question raised by the ruling complained of is whether such fixtures, so annexed to the freehold, remained personal property, so as to enable the mortgagor to maintain trover against the purchaser of the real estate at the mortgagee's sale, for refusal to give them up on demand. There is considerable conflict in the authorities as to whether such fixtures pass by a conveyance of the land on which they are placed or with which they are connected. Under the New York decisions, gas fixtures which are screwed onto the gas pipes of a building are held not to be so attached to the building as to form part of the realty. The decisions there seem to proceed upon the ground that such fixtures as are capable of being easily detached from the building, with-

out physical injury thereto, are mere furniture, and therefore not appurtenances to the building. See McKeage v. Insurance Co., 81 N. Y. 38, and cases cited. In Vaughen v. Haldeman, 33 Pa. 522, it was held that gas fixtures attached to the gas pipes by the owner of the premises were mere personal chattels, and not "fixtures," in the proper sense of the term, and hence did not pass by a sheriff's deed of the real estate. In partial support of the opinion, the court cites Lawrence v. Kemp, 1 Duer 363, where it was decided that gas fixtures, when placed by a tenant in a shop or store, although fastened to the building, are not fixtures, as between landlord and tenant; and also Wall v. Hinds, 4 Gray, 256, where it was held that a lessee could take away gas pipes put in by him into a house leased to him for a hotel, and kept in place in the rooms by metal bands, though some of them passed through wooden ornaments of the ceiling, which were cut away for their removal. From the fact that the court cited these cases, it would seem that it took the view that substantially the same rule obtains regarding fixtures between vendor and vendee of real estate as obtains between landlord and tenant, which is clearly not so. The other case cited in support of the opinion, viz., Montague v. Dent, 10 Rich. 135, was clearly in point, as there it was held that gas fixtures, such as chandeliers and side brackets, attached to the gas pipes by the owner of the premises, were mere personal property, and not fixtures, and hence did not pass by a sheriff's sale of the real estate to which they were attached. In Minnesota the same rule obtains as to gas fixtures, although the court, while holding that they are not part of the realty, admits that it is only by reason of an arbitrary and inconsistent exception, which has been established by the authorities, that it feels called upon to so hold. The court say that the distinction between radiators, which it holds to be part of the realty, and gas fixtures, is not clear in principle. See Capehart v. Foster, 61 Minn. 132, 63 N. W. 257. In speaking of radiators, the court say: "Such radiators are an essential part of such plant, and are rarely furnished by tenants or temporary occupants of buildings as a part of the furniture brought with them or carried away with them, but the owner who furnishes the rest of such plant usually furnishes the radiators also. When, under ordinary circumstances, the owner of the building attaches such radiators

to his steam plant, it should be held that he intended them to be permanently annexed to the realty. We are cited to Bank v. North, 160 Pa. 303, 28 Atl. 694, which holds to the contrary. This case holds that such radiators are analogous to gas fixtures, and therefore not a part of the realty. By following the same process of reasoning by analogy, you would strip a house of all modern improvements, and by continuing the process you would overturn the greater part of the law of fixtures. A correct rule should not, in this manner, be overturned by an inconsistent exception." The court did hold, however, that the electric annunciator, which was attached to the wall, and to all the wires of the electric call or electric bell system of the hotel, was a part of the realty. Massachusetts decisions are classed, in the American and English Encyclopedia of Law (volume 13, New Ed., 666), with those which hold that gas fixtures are not a part of the realty as between vendor and vendee; and the plaintiff's counsel cites Guthrie v. Jones, 108 Mass. 191, and Towne v. Fiske, 127 Mass. 125, in support of this view. The first-named case is clearly not in point, as it was a case between landlord and tenant. And, moreover, it appears, by the second opinion given in the case (see page 195), that the first one was materially modified. The second case, while it holds that gas fixtures are in the nature of furniture, and do not lose their character as chattels by being affixed to the house by screws and cement, is not clearly in point as an authority in the case before us, for the reason that the gas fixtures and other fixtures in question in that case were purchased and affixed to the house by the plaintiff, who was not the owner thereof, but who had taken possession under a mere verbal agreement for the purchase thereof. No deed was ever given, and the question which arose in the case was whether the gas fixtures, portable furnace, and certain other things which the plaintiff had attached to the house during the time of his occupancy thereof became part of the realty, and the court held that they did not. The fact that the court, in support of its opinion, cited Guthrie v. Jones, supra, would seem to indicate that it treated the case before it as one between landlord and tenant, rather than as one between a vendor and vendee of real estate. McConnell v. Blood, 123 Mass. 47, is more nearly in point as an authority for the plaintiff, and it may be that the language there used

by the court is broad enough to include gas fixtures in the category of articles which do not become part of the realty by being affixed thereto. Like the case before us, it was one where the rights of the parties were to be determined by the rules which apply between mortgagor and mortgagee upon a foreclosure sale of the realty. The court said: "Many things which, as between landlord and tenant, would be removable as chattels, are regarded as part of the realty in favor of a mortgagee. In ascertaining what articles have become part of the realty, regard must be had to the manner in which, the purpose for which, and the effect with which they are annexed. * * * Whatever is placed in the building by the mortgagor to carry out the obvious purpose for which it was erected, or to permanently increase its value for occupation, becomes part of the realty, though not so fastened that it cannot be removed without serious injury, either to itself or to the building. On the other hand, articles which are put in merely as furniture are removable, though more or less substantially fastened to the building. So, too, machines not essential to the enjoyment and use of a building, occupied as a manufactory, nor especially adapted to be used in it, are removable, though fastened to the building, when it is clear that the purpose of fastening them is to steady them for use, and not to make them a permanent part of, or adjunct to, the building."

But, conceding that the Massachusetts decisions are in harmony with those of the other states above referred to, yet as the contrary view is taken by other courts of last resort, and as we are not bound by any previous decision of our own court in the premises, we feel at liberty to adopt a different rule, and one which, as it seems to us, is more logical, and more in keeping with the true idea as to what constitutes and goes to make up real estate as between the vendor and vendee thereof. We think the correct rule of law in such cases is the common-law rule, viz.: That whatever is once annexed to the freehold, which is designed by the owner thereof to be used and enjoyed in connection therewith, becomes a part of the realty, and passes with the conveyance thereof. Graeme v. Cullen, 23 Gratt. 290. And although this rule does not obtain as between landlord and tenant, in relation to articles attached to the freehold for ornamental or domestic use, and also with regard to "trade

fixtures," so called, yet it does obtain and should be strictly enforced as between vendor and vendee. It is doubtless true that, as a general thing, a tenant may remove whatever he has added to the realty, when he can do so without injury to the freehold, "unless," as said by Field, J., in Sands v. Pfeiffer, 10 Cal. 264, "it has become, by its manner of addition, an integral part of the original premises." "But not so a vendor. As against him all fixtures pass to his vendee, even though erected for the purposes of trade and manufacture, or for ornament or domestic use, unless specially reserved in the conveyance." And the same strict rule which applies between heir and executor applies equally between vendor and vendee and between mortgagor and mortgagee. 2 Kent, Comm. 411-413.

We are aware that it has been held in some cases that, in order to give chattels the character of fixtures, they must be so affixed to the realty that they cannot be removed without physical injury thereto; but we think the better opinion, as well as the better reason, is the other way, and in favor of regarding everything as a fixture which has been attached to the realty, with a view to enhance the value thereof, and for the purpose of being permanently used in connection therewith. Nor is it necessary that the intention of the owner in affixing such articles should be expressed in words; for it may be, and ordinarily should be, inferred from the nature of the articles affixed, the relation and situation of the parties interested, the policy of the law in respect thereto, the mode of annexation, and the purpose or use for which it is made. Hutchins v. Masterson, 46 Tex. 554. Under the old law, the principal test as to what was or was not a fixture was said to be the nature of the physical attachment to the soil. But this theory has long since been exploded. And as said by Mr. Washburn in his work on Real Property (volume 1, 5th Ed., p. 22): "While courts still refer to the character of the annexation as one element in determining whether an article is a fixture, greater stress is laid upon the nature and adaptation of the article annexed, the uses and purposes to which the land is appropriated at the time the annexation is made, and the relations of the party making it to the property in question, as settling that a permanent accession to the freehold was intended to be made

by the annexation of the article." See, also, Davis v. Mugan, 56 Mo. App. 311; Ewell, Fixt. p. 43, and cases in note 2. In other words, the question whether chattels are to be regarded as fixtures depends less upon the manner of their annexation to the freehold than upon their own nature and their adaptation to the purposes for which they are used. See the leading English case of Elwes v. Mawe (8th Ed.), 2 Smith, Lead. Cas. 169, and note. In Farrar v. Stackpole, 6 Greenl. 157, the court said: "Modern times have been fruitful of inventions and improvements for the more secure and comfortable use of buildings, as well as of many other things which administer to the enjoyment of life. Venetian blinds, which admit the air and exclude the sun whenever it is desirable so to do, are of modern use; so are lightning rods, which have become common in this country and in Europe. These might be removed from the building without damage; yet, as suited and adapted to the building upon which they are placed and as incident thereto, they are doubtless part of the inheritance, and would pass by a deed as appertaining to the realty." In Johnson's Ex'r v. Wiseman's Ex'r, 4 Metc. (Ky.) 357, the question arose whether chandeliers and gas fixtures passed by the sale of the house in question, and it was held that they did. The court said: "There can be no doubt that, upon the sale of the freehold, fixtures will pass, in the absence of any express provision to the contrary." Speaking of the fixtures in question, the court said: "Purchasers and strangers, seeing them in their appropriate places, and no objections made to the sale, would regard them as a part of the freehold, and would bid for the property with the belief that the acquisition of it would confer upon them the right to these articles which, from their nature and position, seemed to be incident to and a part thereof, and thereby be induced to bid more than they would otherwise have done." Walmsley v. Milne, 7 C. B. (N. S.) 115, is a strong authority for the principle that where an article is once affixed by the owner of the fee, though only affixed by bolts and screws, it is to be considered as a part of the realty; at all events, where the object of setting up the articles is to enhance the value of the premises to which they are annexed for the purpose to which those premises are applied. See, also, Holland v. Hodgson, 7 L. R. C. P. 328; Parsons v. Copeland, 38 Me. 537;

Strickland v. Parker, 54 Me. 263; Price v. Brayton, 19 Iowa, 311; Teaff v. Hewitt, 1 Ohio St. 511; Bank v. Kercheval, 65 Mo. 682; Pea v. Pea, 35 Ind. 387; Fechet v. Drake (Ariz.) 12 Pac. 694; Arnold v. Crowder, 81 Ill. 56.

Adopting the general rule, then, as we do, that, as between the vendor and vendee of real estate, whatever has been physically annexed or affixed thereto by the owner, under the conditions aforesaid, becomes part and parcel thereof, and passes with the conveyance of the estate, it follows that the electric light fixtures in question, which take the place of and serve the same purpose as ordinary gas fixtures, passed to the defendants by the conveyance referred to, and hence that the ruling complained of was erroneous. We can see no reason whatever why such fixtures are not as much a part of the realty as radiators, water faucets, set tubs, bath tubs, and bowls, portable furnaces connected with hot-air pipes for heating the building, storm doors and storm windows, window blinds, whether inside or outside, fire grates, pumps, mantels, and such other things as are annexed to the freehold with a view to the improvement thereof. All of these things, though mere chattels before their annexation to the freehold, are no longer such after their annexation, any more than the other materials which go to make up the house, but then become part and parcel of the real estate, and the mere fact that they can be removed therefrom without physical injury to the freehold does not change their character as between the vendor and vendee of the realty. That the authorities upon the question as to what are fixtures in cases of this sort are hopelessly at variance is apparent, upon even a casual examination thereof. Indeed, it has frequently been said that there is no other legal term in so general use as the word "fixtures" to which there have been more different and contradictory significations attached. Ewell, Fixt. 1. We are therefore at liberty, as before suggested, to follow that line of decisions which seems to us the most reasonable and logical, and the conclusion already stated has been reached in that way.

In relation to the statement, hereinbefore made, to the effect that we are not bound by any former decision of our own court in the premises, it is proper to say that we have not overlooked the definition of the term "fixtures" as laid down by Greene,

C. J., in Gas Co. v. Thurber, 2 R. I. 15. But, as that was not a case where the gas company owned the land in which the pipes in question were laid, it is not opposed to the view which we have now taken. Indeed, it rather supports our view, as the court said, that "if the gas company owned the land in which the pipes were laid, we should have no doubt they would be fixtures." * * *

Right of Tenant to Remove Fixtures.

MUELLER v. CHICAGO, M. & ST. P. RY. CO.

111 Wis. 300, 87 N. W. 239. 1901.

Appeal from circuit court, Pepin county; E. W. Helms, Judge.

Action of conversion by Anton Mueller against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

CASSODY, C. J. This is an action to recover damages for the wrongful conversion of a lean-to upon the section house of the defendant at Savoy, near Maxville station. Issue being joined, and trial had, the court, at the close of the testimony on the part of the plaintiff, granted a nonsuit, and from the judgment entered thereon the plaintiff brings this appeal.

It appears from the record, and is undisputed, in effect, that in the spring of 1897 the defendant employed the plaintiff to work for it as section foreman on that section, with the understanding and agreement that the plaintiff and his family should occupy the section house of the defendant at that place; that such section house was 16 feet wide by 26 feet long, and 1½ stories, or 12 feet, high, and situated upon blocks, and upon the land of the defendant, and about 150 feet from the main track, and had an addition to it at the time, which the plaintiff removed after he moved into the section house; that while the plaintiff was so occupying such section house with his family, he did, with the knowledge and consent of the defendant, purchase lumber, and constructed a small lean-to, for a kitchen, against said section house, at the cost and of the value of $67, and also with such knowledge and consent put in a pump of

the value of $7; that such lean-to had two common, middle-sized windows of four lights each, and one door; that the section house had boards up and down, and the plaintiff nailed a two by four piece of lumber on the section house, and fastened the lean-to to that; that the floor was a double floor, and matched, and overhead there was a single pine flooring, matched; that the inside was ceiled up with flooring; that, after the section house and lean-to had remained in that condition for over two years, changes were made on the outside, and, while the plaintiff and his family were still occupying the same as tenant of the defendant, the defendant's bridge carpenters papered and sided the same as directed by the plaintiff, but so that the siding did not go further than the section house, leaving a seam between it and the lean-to; "that, after the plaintiff had placed the repairs and improvements on said section house in the manner aforesaid, and while he was living in said house, the defendant covered all the same with outside sheeting or lap-siding in the usual way, and thereby converted all the same to its own use and benefit, and prevented the plaintiff from removing all the same, as he intended to do in case the defendant did not buy the same from him; and that, soon after the defendant had covered the lumber that the plaintiff had placed on its said building and put in said kitchen, it discharged him from its said employment." The plaintiff was so employed by the month for no stated time, and could quit whenever he pleased, and could be discharged at the pleasure of the defendant. He was discharged in the spring of 1900. After he and his family had moved away, the plaintiff asked the defendant's roadmaster if he could not pay the defendant for the siding it had so placed upon the lean-to, and for the two days' work in putting it on, and then be allowed to take the lean-to away, and remove it to Durand; but the roadmaster replied that that would destroy or injure the building. The plaintiff paid no rent for so occupying the section house with his family, and never agreed to. Upon the facts stated, it is obvious that the lean-to became a fixture on the premises of the defendant, within the principles of law repeatedly and recently stated by this court. Gunderson v. Swarthout, 104 Wis. 186, 190-192, 80 N. W. 465, and numerous cases there cited; Fuller-Warren Co. v. Harter, 85 N. W. 698, 700-702, and

cases there cited. It was physically attached to the section house, and hence to the realty. It was adapted to the use and purpose to which the realty was devoted. It was the intention of the plaintiff, in constructing the same, that it should be so attached, and that it should be used in connection with the section house. There is no claim nor pretense that the defendant ever agreed that the plaintiff might remove the lean-to from the premises. Certainly, a tenant of a dwelling house, in possession under a lease which does not provide that he may remove fixtures placed thereon by him, cannot, after he has surrendered possession to his landlord, re-enter, and remove such fixtures, without permission of his landlord. Yates v. Bachley, 33 Wis. 185; Fitzgerald v. Anderson, 81 Wis. 341, 51 N. W. 554; Keefe v. Furlong, 96 Wis. 219, 70 N. W. 1110; Friedlander v. Ryder, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700. We find no error in the record.

The judgment of the circuit court is affirmed.

CHAPTER VII.

THE LANDLORD'S RIGHTS, DUTIES AND LIABILITIES.

Duty to Repair—Injury to Tenant's Wife—Whether Landlord Liable.

BORGGARD v. GALE.

205 Ill. 511, 68 N. E. 1063. 1903.

Error to Appellate Court, First District.

Action on the case by Anna M. Borggard against Stephen F. Gale. From a judgment of the Appellate Court (107 Ill. App. 128) affirming a judgment of the superior court in favor of defendant, plaintiff brings error. Affirmed.

HAND, C. J. This is an action on the case, brought by the plaintiff in error in the superior court of Cook county against the defendant in error to recover damages for an alleged injury caused to her by reason of her stepping into a hole in the floor of certain premises rented by her husband from the defendant in error for a store. A trial resulted in a judgment in favor of the defendant in error, which has been affirmed by the Appellate Court for the First District, and a writ of error has been sued out from this court to review the judgment of the Appellate Court.

The only ground relied upon in this court for a reversal which we can consider is the giving of the second and third instructions offered upon behalf of defendant in error. The second instruction informed the jury that the defendant was not liable to the plaintiff for any injuries which she may have sustained after her husband took possession of the premises under the terms of the lease, even though said premises were let with a nuisance upon them by means of which the injury was received, unless, through the fraud or concealment of the defendant, the husband was induced to take possession of the premises without

knowledge of the existence of such nuisance. The only criticism made upon the instruction is that it states the defendant is not liable unless by "fraud or concealment" practiced by him the husband was induced to take possession of the premises without knowledge of the existence of the defective condition of the floor. The lease which was in force at the time of the injury contained the following clause: "That he [plaintiff's husband] has examined and knows the condition of said premises, and has received the same in good order and repair, and that no representation as to the condition or repair thereof has been made by the party of the first part or his agents, prior to or at the execution of this lease, that is not herein contained or herein endorsed; that he will keep the said premises in good repair during this lease at his own expense." The plaintiff testified that there was a hole 6 by 12 inches in size in the floor of a small room opening off of the storeroom when her husband took possession of the premises, the existence of which was unknown to her or her husband; that a day or two thereafter she unavoidably stepped into said hole, and was severely injured. One Locke, defendant's agent, who leased the premises to plaintiff's husband through the plaintiff in error, testified that prior to the injury the plaintiff pointed out to him the hole in the floor, and he agreed to have the same repaired; that the carpenter was engaged in making repairs upon the premises at the time the injury occurred; and that he had requested the plaintiff and her husband not to occupy the premises until the repairs were completed, but that they moved into the same before the repairs were complete. The testimony of the plaintiff and Locke was all the evidence bearing upon the subject.

The general rule is that a landlord is not bound to make repairs unless he has assumed such duty by express agreement with the tenant. An exception to the rule, however, exists where there are defects in the demised premises, attended with danger to an occupant, which a careful examination would not disclose, which are known to exist by the landlord and are not known to the tenant. In such case a duty rests upon the landlord to notify the tenant of such defects. Sunasack v. Morey, 196 Ill. 569, 63 N. E. 1039. The duty resting upon the landlord to notify the tenant of a defect in the premises which a careful examination would not disclose, but of which the landlord has

notice while the tenant has not, we think may well be placed upon the ground, in many cases, that a failure to make such disclosure would be a fraud upon the tenant. For instance, if the premises were infected with a contagious disease, as was the case in Snyder v. Gorden, 46 Hun, 538; or impregnated with sewer gas, the presence of which was denied by the landlord, as in Sunasack v. Morey, supra. But the instruction given in this case did not require that the plaintiff should prove fraud before a recovery could be had, but only concealment of the defect, as the disjunctive "or" was used in the instruction between the words "fraud" and "concealment," so that, if the evidence showed the hole in the floor to have been a latent defect, that the landlord had notice of its existence, and the husband of the plaintiff had not such notice, and the landlord concealed the defect by failing to perform his duty by notifying him of its presence, unless the plaintiff had actual notice thereof there might be a recovery; and this much proof seems to be required by all the authorities to entitle the plaintiff to recover. Sunasack v. Morey, supra; Cowen v. Sunderland, 145 Mass. 363, 14 N. E. 117, 1 Am. St. Rep. 469; Anderson v. Hayes, 101 Wis. 538, 77 N. W. 891, 70 Am. St. Rep. 930. * * * We do not think the giving of said instruction constituted reversible error.

We have examined the third instruction, and think, in view of the evidence, it states the law correctly, and that the objection made thereto is hypercritical, and without force.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Landlord's Right to Enter to Make Repairs.

DARLINGTON v. DE WALD.

194 Pa. St. 305, 45 Atl. 57. 1900.

Appeal from court of common pleas, Allegheny county.

Action by Harry Darlington against W. H. De Wald and others, doing business as De Wald, Wuesthoff & Co. Judgment for plaintiff. Defendants appeal. Affirmed.

GREEN, J. * * * The learned trial judge gave very clear instructions to the jury, explaining with much preciseness and entire correctness the very questions upon which it would be necessary for them to pass. He explained fully the meaning of ordinary wear and tear, the character of the repairs which the defendants were required to make in order to preserve the property in the same condition as when it was received, and left to them exclusively the determination of the question whether the defendants had performed their covenant in this respect. In defining particularly what question they must decide, he said, speaking of the defendants: "They made those repairs, but the contract was to hand the building over, not with the repairs kept in perfect condition, but just as good as it was when Mr. Darlington handed over the property to them. Now, did they do that? If they did not, to what extent was the property damaged by reason of their treatment of it during the term that they had possession? They were bound to return it in as good condition as they found it. They were not bound to make repairs under the terms of the lease. They could have left the building stand just as they got it, without any repairs. But, if they injured the building, if they caused it to be in worse condition, ordinary wear and tear taken into consideration, than it would have been if they had done what they ought to have done, they are responsible for the condition, and are bound to pay the landlord, Mr. Darlington, an amount that would put the building in as good condition as it was when they got it. The first question is, what was the condition, under the testimony, of the building at the time the defendants got it? And then, what was the condition at the time these repairs were made by the plaintiff? They were not made against the wishes of the tenants; that is apparent. They were made previous to the termination of the lease. That is not material, so far as this case is concerned. They were made with the implied consent of those in possession; and the simple question is, so far as made, were they necessary to put the premises in the condition they were at the time the defendants got possession of them? If they were made then, the plaintiff is entitled to recover a verdict for the fair value of what it cost; not for all he did, nor for what he may have seen fit to do, but just for whatever was necessary to put the building in the condition it was at the time

the defendants got possession." It seems to us this instruction was perfectly correct in every legal sense. If the defendants were bound by their covenant—as they certainly were—to put the property in as good condition as it was when they took possession, the question to be determined was, had they done this? and, if they had not, and the plaintiff has thereby been compelled to do it by reason of their default, he certainly was entitled to recover from the defendants the money he was obliged to pay for that purpose. The court was careful to say to the jury that the plaintiff could not recover the whole amount he expended, but only that proportion of the amount which he was obliged to expend to restore the property to its condition as it was when the defendants received the property from him. As we understand the law, this was the exact question the jury had to decide, and they did decide it. The plaintiff expended in the works and repairs that he made $8,994.19, and the jury allowed him $1,200, as representing that portion of his expenditure which they considered the defendants ought to have incurred.

As to the fact that the plaintiff entered upon the premises and made repairs before the expiration of the lease, what the court said on that subject was perfectly correct. He did enter upon the premises and do that work before the end of the term, but he did so most manifestly with the consent of the defendants. There is not a scrap of testimony showing that they, or any of them, ever made the slightest objection to what he was doing. They could not help but see what he was doing; and by making no objection, and looking quietly on while the work was being done, their consent is necessarily implied. Moreover, two of them (the Wuesthoffs) left the premises voluntarily in September, 1896, several months before the end of the term, and settled with the plaintiff for all claims for rent of the premises. The other defendant, who was a relative of the plaintiff, remained in possession. None of the defendants did anything towards restoring the property to its original condition, and the plaintiff was certainly not bound to wait until the end of the term and take the risk of the falling of the walls, if there was such a risk, before doing the necessary work to preserve the building. In this view of the case, the authorities cited for the defendants, to the effect that the landlord could not enter

and make repairs until after the end of the term are not applicable. Of course he could do so with the consent of the tenants. And the authorities to the effect that no action could be brought to recover the amount expended in making the necessary repairs until after the term had expired are not applicable, because the present action was not brought until after the term had expired.

On the question of damages the learned court below charged that, if the plaintiff was entitled to recover, he could recover the cost of that part of the repairs which the defendants failed to make, and which the plaintiff was obliged to make on account of their dereliction; and, as that would be the amount of the damage he would really sustain, we know of no reason why that should not be the correct measure of the damages he was entitled to recover. We are not referred to any Pennsylvania, nor, indeed, to any American, authority which holds that the true measure is the value of the injury to the reversion, and therefore we do not see any sufficient reason for adopting that measure. The latter rule may be applicable where, the landlord being out of possession, and the tenant having left the property without the proper repair being made, the landlord brings his action for non-repair; but where he has made the repair himself the cost of the repair would be his proper measure of damages. In 3 Sedg. Dam. § 990, and in Watriss v. Bank, 130 Mass. 343, it was said that, where the tenant leaves the premises out of repair, the measure of damages is the cost of putting them into repair, and not the depreciation in the value of the property. The assignments of error are all dismissed.

Judgment affirmed.

CHAPTER VIII.

THE TENANT'S RIGHTS, DUTIES AND LIABILITIES.

Tenant Cannot Deny Landlord's Title.[2]

NICROSI v. PHILLIPI.

91 Ala. 299, 8 So. 561. 1890.

Appeals from city court of Montgomery; T. M. Arrington, judge.

Actions of unlawful detainer, and for use and occupation.

McCLELLAN, J. These two cases, which were argued and submitted together, involve, respectively, the right of the administrator of Jeannette Guily, deceased, to maintain the action of unlawful detainer for certain lands alleged to have belonged to her in her life-time, and an action for use and occupation of the same by Phillipi for a period subsequent to her death, he having held over after the expiration of a term for which he entered, and which expired before her death. The general charge was asked by both parties on the trials below, was denied to plaintiff, and given for the defendant; and this action of the city court is now presented for review. The principles of law applicable to the facts of the case, and obtaining with respect to both forms of action, are few and familiar. We will, for convenience, first consider separately the unlawful detainer case. That action is cognizable before justices of the peace. These officers have, and can have, under the present constitution, no jurisdiction to try questions of title to land. Const. art. 6, § 26; Webb v. Carlisle, 65 Ala. 313. The statute conferring the jurisdiction here invoked expressly inhibits all inquiry into the merits of the title. Code, § 3389. And the decisions of this and all other courts are uniform to the effect that title is not within the issue involved in this action. Welden v. Schlosser, 74 Ala. 355; Houston v. Farris, 71 Ala. 570; 8 Amer. & Eng. Enc. Law, p. 126.

[2] See also Davis v. Williams, supra.

The thing that is involved is such right of possession between the parties to the record, as may be worked out and adjudged aside and apart from all considerations of title; and, hence, wholly regardless of whether the plaintiff or defendant or a third person has the superior claim to the ownership of the property. The action is maintainable by any one entitled to the immediate possession against any one unlawfully withholding possession, where the relation of landlord and tenant exists between the parties. It is insisted here that the plaintiff's right to recover must in all cases rest upon a prior actual possession, actual in the sense of being possessio pedis by him personally, and prior in the sense of antedating defendant's entry. This is not the law. The books are full of declarations to the effect that in this action, and in that of forcible entry and detainer, the plaintiff must show prior actual possession. We have no purpose to dissent from that view in any particular. It is not meant thereby, however, that the plaintiff in unlawful detainer must show actual possession either in himself or in another for him, antedating the entry of the defendant. What is meant is that he shall prove an actual possession in himself prior in point of time to the inception of the wrongful possession of the defendant; prior to the beginning of the unlawful detainer by the defendant. Where the gravamen of the action is forcible entry, the plaintiff's possession must, of course, antedate the entry, since that is an offense only against the then existing possession, and must be redressed by the party who had that possession. But here the offense is against the possession which existed up to the moment of time when the defendant ceased to hold under his lease, and assumed to hold otherwise than in subordination to him whose possession he theretofore had. So long as the tenant holds under his lease, his actual possession is the actual possession of the landlord; and proof of this actual possession, through and by his tenant, prior to and continuing to the time of the beginning of the unlawful detainer, fully meets the requirements of the doctrine under consideration. Conditions of fact are very numerous, which, while involving no prior actual possession in the person of him who asserts the right to the possession, yet constitute the relation of landlord and tenant between the parties, with all the rights, remedies, limitations, and estoppels incident thereto. Thus,

for instance, the relation exists between the heir, upon descent cast, and the tenant of the ancestor, (Beezley v. Burgett, 15 Iowa, 192; Turly v. Foster, 2 A. K. Marsh. 204; Stinson v. Gosset, 4 Ala. 170; Dwine v. Brown, 35 Ala. 596; Hightower v. Fitzpatrick, 42 Ala. 597); between a mortgagee, after default, and a mortgagor, who remains in possession under a contract to pay rent (Strauss v. Harrison, 79 Ala. 324); between a vendee and a vendor who retains possession after conveyance under like agreement (Vancleave v. Wilson, 73 Ala. 387); between the personal representative, who has taken the statutory steps necessary to an appropriation of the decedent's land or its rents to the debts of the estate, and a tenant originally let in by the latter (Lass v. Eisleben, 50 Mo. 122; Scott v. Lloyd, 16 Fla. 151; Moody v. Ronaldson, 38 Ga. 652); between a purchaser from the lessor, pending the term, and the tenant under the lease (3 Brick. Dig., p. 599, § 28 et seq.); and, in general, it may be said, between a person in possession who accepts a lease from or attorns to another, who in good faith claims title to the land. And in all such cases, the landlord is in actual possession by his tenant, and upon the possession may well ground his right to oust the tenant, who holds over after the expiration of the term, in the action of unlawful detainer. Tayl., Landl. & Ten., §§ 705, 713, et seq.; Lecatt v. Stewart, 2 Stew. (Ala.) 474; Beck v. Glenn, 69 Ala. 126; King v. Bolling, 77 Ala. 594. In the case at bar, the defendant, though at the time and theretofore in possession of the premises, in December, 1887, accepted a lease from the plaintiff, as administrator of Jeannette Guily, retained possession thereunder, and paid for a time the monthly installments of rent as they fell due. His possession during the term of this lease was the possession of Nicrosi; being actual, plaintiff's possession was actual, and, antedating the unlawful detention, was prior possession in the plaintiff in the sense necessary to affording a predicate for the recovery here sought. One of the familiar incidents of the relation of landlord and tenant is the estoppel which seals the lips of the latter to deny the title of the former; and, in the application of this doctrine, it is entirely immaterial whether the tenant was let into the possession by the landlord, or, being already in possession, accepts a lease from or attorns to the party claiming to be the landlord. In the absence of fraud and mistake, the ten-

ant, however, or under whomsoever he entered into possession, is estopped to deny the title of the party under whom he holds by the acceptance of a lease, or by attornment. Lyon v. Washburn, 3 Colo. 201; Thayer v. Society, 20 Pa. St. 60; McConnell v. Bowdry, 4 T. B. Mon. 392; Patterson v. Hansel, 4 Bush, 654; Richardson v. Harvey, 37 Ga. 224; Berridge v. Glassey (Pa.), 7 Atl. Rep. 749; School-District v. Long (Pa.), 10 Atl. Rep. 769; Tyler v. Davis, 61 Tex. 674; Terry v. Ferguson, 8 Port. (Ala.) 502; Griffith v. Parmley, 38 Ala. 393; Beck v. Glenn, supra; King v. Bolling, supra. * * *

Destruction of Premises. Tenant's Liability for Rent. Effect of Statute. Surrender of Premises.

GAY v. DAVEY.

47 Ohio St. 396, 25 N. E. 425. 1890.

Error to district court, Hamilton county.

DICKMAN, J. On the 7th day of July, A. D. 1879, James P. Gay leased to John R. Davey and A. B. Allen, the defendants in error, certain premises in the city of Cincinnati for the term of three years from that day, the lessees to have the privilege of a further term of two years, commencing with the 7th day of July, 1882. The premises, used for manufacturing purposes, are described as situated in the city of Cincinnati, being three rooms on the front of the first, second, and third floors of James P. Gay's main building fronting on the north side of New street, and the room in the third story of the addition to the main building; also a strip of ground lying on the west side of the main building, being 12 feet in width on the north side of New street, and running back the same width to the building described as the addition to the main building, the lessor to erect a one-story brick office 12 feet by 16 feet adjoining the southwest corner of the building on New street, for occupancy by the lessees. As rent, the lessees were to pay during the term of three years the sum of $125 per month, payable monthly, commencing on the 7th day of August, 1879, and on the 7th day of each and every month thereafter during such term. The

entire building, including the apartments leased to Davey and Allen, was destroyed by fire on the 11th day of December, 1880, but was rebuilt by the lessor, and was ready for occupancy in the early part of January, 1881. When the building was restored, the lessees declined to pay rent from the time of restoration, and the lessor commenced suit in the superior court of Cincinnati to recover the rent from January 7, 1881, to May 7, 1881. The lessees set up in defense that, by the terms and provisions of the lease under which they had occupied the premises, it was stipulated that, if the occupied premises were destroyed or rendered untenantable by fire or unavoidable accident, they were not to be required to pay any rent thereafter; that the premises were totally destroyed on the 11th day of December, 1880; that they did not use, occupy, or enjoy the premises at any time thereafter; that the premises were destroyed without any default or neglect on their part; and that the lessees thereupon surrendered possession of the premises to the lessor. The lessor, in reply, denied that the premises included in the lease were totally destroyed by fire, and alleged that there was only a partial destruction of the same, the brick office not being materially injured, and continuing tenantable; and further denied that the premises were ever surrendered to the lessor by the lessees. The lease contained the covenant "that said lessees will pay said rents, in manner aforesaid, except said premises shall be destroyed or rendered untenantable by fire or unavoidable accident." Before the trial, the death of the plaintiff was suggested, and it was ordered that the action be revived in the name of Sarah E. Gay, the plaintiff in error, as executrix of the last will and testament of James P. Gay, deceased. On the trial, a jury being waived, the court, upon the testimony, found in favor of the plaintiff, and entered judgment for the amount claimed, with interest and costs. The defendants thereupon filed their motion to set aside the judgment, and for a new trial, mainly on the ground that the finding of the court was against the weight of the evidence, which motion the court overruled.

* * * * * * * * * *

In remanding the cause for further proceedings, there are legal principles that claim consideration. Where the tenant, who expressly covenants to pay rent, has not protected him-

self by a saving clause in the lease, the proposition is generally true that he will be bound to continue the payment of rent after the destruction of the tenement by fire or unavoidable accident, and will have no relief against such express covenant. Having by his own contract created a duty or charge upon himself, he will be bound to make it good, notwithstanding any accident or inevitable necessity, because against such casualty he might have provided by his own contract, if he had thought proper to do so. Linn v. Ross, 10 Ohio 412. But under the facts, as it is claimed they exist, the defendants in error insist that they are discharged from the payment of rent by the stipulation in the lease that if the premises occupied by them should be destroyed, or made untenantable by fire or unavoidable accident, they were not thereafter to be required to pay rent. If the lease had contained a covenant on the part of the lessor to rebuild the premises if destroyed, and he had rebuilt in accordance with his covenant, the stipulation would not discharge the lessees from liability to pay rent. But the lessor was under no obligation to rebuild, and the rights of his tenants secured by stipulation in the lease, and accruing immediately upon the destruction of the premises by fire, were not to be kept in abeyance by the contingency of the lessor's concluding to rebuild. If, however, after the building was burned, the owner was requested and induced by the lessees to rebuild for the lessees' use and occupation, they could not justly avoid the payment of rent, after the building had been restored to its former condition. Furthermore, it is contended in behalf of the defendants in error that they are relieved from the payment of rent under § 4113 of the Revised Statutes. That section reads as follows: "The lessee of any building which, without any fault or neglect on his part, is destroyed or so injured by the elements, or other cause, as to be unfit for occupancy, shall not be liable to pay rent to the lessor or owner thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant; and the lessee shall thereupon surrender possession of the premises so leased." The obvious design of this statutory provision is to relieve from hardship the tenant who has inadvertently neglected to protect himself by express covenant in his lease against the necessity of paying rent after the leased premises have been destroyed

by fire or other casualty. But, to secure the benefit of the statute, the tenant must surrender or yield up all that remains of the premises embraced in the lease, without any purpose or intention of resuming possession thereof. The legislature has absolved the tenant from an onerous obligation, but the burden is removed only upon his compliance with the statutory condition. The statute, in case the buildings are destroyed, does not clothe the landlord with the power of terminating the lease, and if the tenant alone is to have the option of so doing, and may be discharged from the obligation to pay rent, he must give up the possession and control of the premises to him who is entitled to the reversion. If he would preserve the lease in full force, and avail himself of its advantages, he must also bear any incidental hardship that may arise during its continuance. The clause in the statute for surrendering possession of the premises would be without significance, if not construed as qualifying the provision for a release of the tenant from the payment of rent. In Johnson v. Oppenheim, 55 N. Y. 280, the court of appeals, in construing chapter 345 of the New York Laws of 1860, which is substantially the same as the statute of Ohio, in *pari materia,* say: "The act provides that, upon the destruction or injury of leasehold buildings so that the same are untenantable, the tenant shall not be liable or bound to pay rent, and that he may thereupon quit and surrender the possession of the premises. The tenancy is not made absolutely to cease, except at the option of the tenant. He is relieved from his obligation, if he chooses to avail himself of the provisions of the act, or he may perform the covenants of his lease and retain the benefit of it; but he cannot have the benefit of the law, and at the same time repudiate its obligations. If he elects absolution from its obligations, the act, by necessary implication, imposes as a condition the surrender of the premises." Such is manifestly the correct interpretation of the statute. But it is contended the rule is well settled that, in the absence of covenant, when the subject-matter of the demise is destroyed by fire or other casualty—as a house, where the land on which it rests is not rented, or apartments in the house, whether for purposes of trade or otherwise—the destruction of the building terminates the relation of landlord and tenant, and there is nothing left to surrender to the owner or lessor. While this

may be a correct statement of the general principle, the contract of lease in the case at bar was entire, and embraced, not only the rooms in the destroyed building, but also the one-story brick office, and the strip of ground lying on the west side of the main building. If, therefore, the building was totally destroyed by fire, and a surrender of the leased rooms became impossible, it could not be so said of the office and strip of ground, if the lessees, after the fire, continued to use and occupy the same until the building was restored and ready for occupancy. As to those portions of the demised premises that were not destroyed, and remained tenantable, there was no apparent obstacle in the way of a surrender as contemplated in the statute. The final judgment in favor of Davey and Allen should be reversed, and cause remanded.

Judgment accordingly.

CHAPTER IX.

RENT.

Tenant Holding Over Term. Question of Rent. What Constitutes a Holding Over.

HERTER v. MULLEN.

159 N. Y. 28; 53 N. E. 700. 1899.

Appeal from supreme court, appellate division.

Petition by Albert Herter against Jeremiah J. Mullen and another. From a judgment of the appellate division affirming a judgment for plaintiff (41 N. Y. Supp. 708), defendants appeal. Reversed.

O'BRIEN, J. The plaintiff's action was to recover rent alleged to be due upon the lease of certain premises for the month of May, 1895, and the six following months of that year. The lease was executed in March, 1894, and was to terminate in one year from the 1st of May following. The defendants, who were the tenants under the lease, vacated the premises on May 15, 1895, but, as it was claimed that they held over after the expiration of the lease for 15 days, it was held that they were liable for the rent for another year, and the plaintiff recovered for the seven months of the year that had elapsed before the commencement of the action. The rent, by the terms of the lease, was payable monthly, and the court directed a verdict for the plaintiff for $558.63, being the stipulated rent for the seven months, with interest.

The complaint alleged the making of the lease, the possession thereunder by the defendants, and that they had continued in possession until the time of the commencement of the action. The defendants, in their answer, allege that they surrendered possession of the premises to the plaintiff on May 15, 1895, and that he accepted such surrender; that they had notified him in the month of February preceding that they would not take or

keep the house for another year after May 1, 1895, when the term fixed by the lease expired; that, after this notice, the plaintiff was permitted to show the premises to persons wishing to hire or purchase them, and to place upon the house the usual notice that it was to let; that the defendants moved from the house, with all their property and belongings, and that of the family, on the 1st day of May, 1895, before the lease expired, except from the bedroom, where their mother was confined by a dangerous illness until the 15th of May following, when she was removed, and the premises wholly vacated; and that they were forbidden by the physician in charge from moving or disturbing the mother during the 15 days, and were informed by him that it would imperil her life if an attempt was made to remove her. These affirmative allegations in the answer were pleaded together as a single defense. On the trial it was conceded that the defendants had the affirmative of the issues, since the written lease was produced and admitted by the pleadings and the possession under it.

It appears from the record that the defendants' counsel then proceeded to open the case to the jury, and at the close of the opening the court suggested that the controversy would resolve itself into a pure question of law, and that the facts should be agreed upon. The plaintiff's counsel then admitted that the notice from the tenants of their intention to surrender up the premises on the 1st of May had been given in February, as alleged in the answer. The defendants' counsel then stated that the reason for holding over after the expiration of the lease was the sickness of the defendants' mother, she then being a member of their family; and he stated that, unless he could have it admitted as it is pleaded, he wanted no admission whatever. The plaintiff's counsel then admitted that fact, as set forth in the answer. The last clause of the answer contained an allegation that the holding over was with the knowledge and permission of the plaintiff, the landlord, and at the suggestion of the plaintiff's counsel this allegation was withdrawn. The case then states that upon the record and the defendants' counsel's opening, the court, at the request of the plaintiff's counsel, directed a verdict against the defendants for $558.63, and that the defendants excepted to this direction. * * *

But, perhaps, the most important question in the case arises

upon the facts and circumstances which it is claimed constitute a holding over by the tenant after the expiration of the term specified in the lease. For every purpose necessary to the determination of that question we must assume that the facts are as alleged in the answer, since it must have been upon that assumption that the verdict was directed. There can be no doubt that the rule of law is settled beyond debate or controversy which permits the landlord, at his election, to treat the tenant as holding for another year when the latter remains in possession after the expiration of the term. When the demise is for a definite term of one year at a fixed rent, and the tenant holds over after that term expires, the landlord may treat him as a tenant for another year, and collect rent accordingly. Haynes v. Aldrich, 133 N. Y. 287, 31 N. E. 94; Adams v. City of Cohoes, 127 N. Y. 175, 28 N. E. 25. But the question is whether the tenant did, in fact, hold over after the expiration of the term, within the meaning of that rule. If it is an arbitrary one, applicable under all circumstances and conditions, and to be enforced in every case, without regard to the reason upon which it is founded, it may be said that, in a strict sense, there was a holding over in this case. But this rule that obtains in the relation of landlord and tenant is a part of the common law, the chief merit of which is supposed to consist in its adaptability to changing circumstances and new conditions as developed in the progress of time. It is not an unchangeable code, like that of the Medes and Persians, but a system that has grown up with the growth of civilization, and is capable of being molded to meet the wants of society in every stage of its progress. From the facts disclosed by the answer in this case the tenant vacated the house at the expiration of the term, except one bedroom, in which a member of his family was confined by illness so serious that he was warned by the physician that any attempt to remove her would imperil her life. The decision of the learned trial court in the case virtually holds that on the last day of the tenant's term he was placed in a position where he must either pay rent for another year for a house that he did not intend to occupy, or to take the risk of becoming, in a certain sense, responsible for the death of his mother by attempting to remove her from a sick room against the protest of a physician. This would seem to be pushing a rule of law applicable to the relation of

landlord and tenant to a point which makes it very unreasonable, if not absurd; and, before assenting to such an application of it, we are naturally forced to inquire whether there was, in fact, any such holding over by the tenant in this case as the rule fairly contemplates. Does a tenant who, on the last day of the term, is upon his death bed, or is quarantined in his house by the public authorities to prevent the spread of some dangerous or infectious disease, or is insane, or compelled to remain in the house, against his will, by some superior force or stress of circumstances, hold over within the meaning of the law, or in the sense that permits the landlord to treat him as a tenant for another year? The principle upon which the rule is founded is that the holding over is such an act of the tenant that the law implies a contract on his part, or leasing of the premises for another year. But whenever the law implies a contract from the act or conduct of the party, the act itself, whatever it may be, must be voluntary. The law does not imply a contract or obligation from an act of the party which proceeds from mistake or fraud, or which results from force or coercion of any kind, or is due to any stress of circumstances which involves peril to his life or that of some member of his family. To infer a promise or contract from any act plainly resulting from such causes would manifestly be contrary to reason and justice. The question therefore occurs whether the tenant in this case, by failing to remove his mother from the bedroom in the house, or by her presence there during the 15 days after the expiration of the term, should be held for another year's rent, on the principle that an agreement to hold for another year is to be implied by law from his conduct under the circumstances. If this question must necessarily be answered in the affirmative, there would be no grounds for any further discussion. But it seems to me that, upon reason and all the analogies of the law, a hiring for another year cannot and should not be implied against the tenant under such circumstances. The case is not within the reason of the rule, and therefore is not governed by it. While this court has firmly adhered to the principle that the landlord is entitled to treat the tenant who holds over as lessee for another year, it is plain, from what was said in one of the most recent cases, that the rule was not considered an arbitrary one. On the contrary, it

timated that it was not so rigid that it could not properly ade to bend in exceptional and peculiar cases. Haynes v. ich, supra. Where the holding over is wrongful or volun- and not unavoidable in the strictest sense, the rule must ermitted to have full application. But where the tenant, this case, is obliged to retain a room in the house for a period of time in order to avoid the peril of exposing a ber of his family to danger and death, it cannot properly be that it is a holding over within the meaning of the law. re a party acts under such a stress of circumstances, the annot be said to proceed from his own volition any more if he had been detained in the house by the police under lirection of the health authorities.

* * * * * * * * *

is important to note with more distinctness the wide dif- ce between this case and Haynes v. Aldrich, supra. In case the tenant violated one of the covenants of the lease ıbletting the premises. The subtenant held over after the ation of the term, and the tenant was sued for rent upon rinciple that the holding over created a tenancy for another

The tenant sought to excuse the holding over by the ıtion that a distant relative of the subtenant, who was in ssion, was detained in the house after the expiration of erm by sickness. This court held that, inasmuch as the tting was in violation of the lease, and was a wrongful n the part of the tenant, he could not be excused by a ion which was plainly the result of his own violation of enant of the lease. It is plain that the situation which it claimed excused the tenant was of his own creation by ng another party in possession of the premises. The hold- ver in that case was very properly attributed to the wrong- ct of the tenant in putting a stranger into possession of lemised premises.

ıen a tenant for a year actually holds over after the ex- ion of the term, the legal consequences which follow are settled and understood. The landlord may, at his election, him either as a trespasser or a tenant for another year; n any case the fact of holding over must be established. landlord cannot treat him as a tenant, and collect the rent nother year, unless the facts are such as to justify him in

proceeding against him as a trespasser. An act which might ordinarily constitute a trespass when done or committed intentionally or voluntarily, cannot always be such when done or committed involuntarily. Moak, Underh. Torts, pp. 10, 15. The mere fact that the tenant, or some member of his family, is obliged to remain in a room in the house after the expiration of the demised term, may not necessarily amount to a trespass. Whether it does or not must depend upon circumstances. If he is detained there by the act of God, or of some superior legal power, or some unavoidable necessity, he is not ordinarily deemed to be a trespasser. A trespass presupposes some wrongful act towards the person or property of another. If the tenant in this case actually held over, the plaintiff could maintain ejectment against him; but, since his intention to remove on the day the lease expired is clear, and this purpose was defeated only by the dangerous illness of a member of his family, it would, I think, be difficult to say that he had such a possession of the house as would support an action of ejectment; and the same facts and circumstances that would protect him from such an action would also defeat the present claim, which is based upon the theory of an implied agreement to lease for another year. I do not mean to say that the facts stated in the answer would be a defense to an action by the landlord for damages based upon the breach of the covenant in the lease to surrender the demised premises at the expiration of the term. A duty or obligation imposed by law and one created by contract or covenant stand upon different grounds when the party seeks to be excused by the act of God, or unavoidable accident, or stress of circumstances. But in this case the right of the landlord to collect rent for the second year does not depend upon any express contract or covenant. It rests wholly upon the legal implication derived from the wrongful act of the tenant in holding over; and if that act was not in fact wrongful, but, under the circumstances, excusable, then there is no basis for any implied promise or agreement. I assume that if the tenant, or some member of his family, should die on the last day of the term, that no one would then contend that the continued occupation of the house for a few days during the funeral would amount to a wrongful holding over within the meaning of the law. Such an interpretation of a principle of the common law would

shock, not only our sense of justice, but every feeling of decency and humanity. The case before us differs from that only in degree. Both cases must be governed by a common principle. It is obvious that in the application of the rule now under consideration to the relation of landlord and tenant there must be a point beyond which we cannot go, and that point is reached when the alleged holding over cannot be attributed, directly or indirectly, to some fault on the part of the tenant. There may be cases in which the occupation of a room in a house after the lease has terminated will not amount to a trespass, or warrant the implication of a lease for another year. Since a party cannot, as a general rule, commit a trespass or make a contract without some effort of volition on his part, an act due to unavoidable accident, or resulting from some overruling necessity or stress of circumstances, can form no basis for imputing a wrong or inferring a contract. It is reasonable, therefore, to conclude from the facts and circumstances stated in the answer that the defendant was not a trespasser during the 15 days that his mother occupied the room in the house, and could not be removed without endangering her life, nor a tenant for another year. It follows, therefore, that the plaintiff was not entitled to recover rent from the time when the house was completely vacated.

It may be said that this conclusion is a departure from precedent, but it is not easy to see how it is. No case has been cited, and none has been found, where it was held that such a state of facts or such a situation as is disclosed by the answer amounted to a holding over by the tenant within the meaning of the rule that is invoked by the landlord to sustain this action. Legal rules may sometimes be pushed to a point where they accomplish the grossest injustice, and it then becomes the duty of the courts to limit their application to cases that are within their true scope and fair meaning. We go no further than to say that, upon the facts stated in the answer, if conceded or established, there was no holding over by the tenant within any fair or reasonable meaning of the rule which permits the landlord to continue the lease for another year. The judgment should be reversed, and a new trial granted, with costs to abide the event.

* * * * * * * * *

GRAY, J. (dissenting). This action was brought to recover of the defendants the rent of certain premises in the city of New York, which had been originally leased to them by the plaintiff for the term of one year from May 1, 1894. The defendants held over for some 15 days after the expiration of the term, and the rental moneys claimed in the action were for 7 months subsequent to May 1, 1895. The defense set up in the answer was, in substance, that, prior to the expiration of the term mentioned in the written lease, the defendants had notified the plaintiff that they would not take the premises for another year, and that they had hired another house, but that they had been prevented from yielding up possession "by the act of God in afflicting the mother of these defendants, who was a member of the family of the defendants, with a disease which * * * was so great that it would have endangered her life to have taken her from the room." The lease contained the usual agreement of the lessees to quit and surrender the premises at the expiration of the term. Upon the trial no evidence was given, the facts being then and there stipulated between the parties. The plaintiff admitted that the defendants notified him, in February, 1895, that on the 1st day of May, 1895, they would surrender the possession of the premises, and the defendants admitted that they remained over after the 1st of May without the assent of the plaintiff. The plaintiff admitted to be true the statement of the defendants that the mother of the defendants was ill on the 1st of May, 1895, and in the condition alleged in their answer. Upon these admissions of the parties, the trial judge directed a verdict for the plaintiff for the amount of rental moneys demanded under the terms of the written lease. To that direction the defendants excepted, and, the appellate division having affirmed the judgment entered against them, they further appeal to this court.

The question thus raised for our consideration is whether the rule of law, which has always controlled in such cases, is to be affected by the fact that the holding over by the defendants was by reason of the illness of their mother, as a member of the family, and therefore, in that sense, involuntary. The doctrine has been long a settled one in this state that a tenant who holds over his term, either is a trespasser or continues to be a tenant, at the sole election of the landlord, and that, in the latter case,

the legal implication is that he holds at the former rent. As this appeal should be disposed of upon authority, I shall advert to a few cases and to the opinions which have been expressed. The question was early discussed in what may be regarded as the leading case of Conway v. Starkweather, 1 Denio 113, where the tenant held over his term for the period of two weeks. Bronson, C. J., in his opinion, laid down the rule with considerable pertinency, and said that: "The tenant has no such election as that which belongs to the landlord. If he holds over, though for a very short period, without any unequivocal act at the time to give his holding the character of a trespass, he is not afterwards at liberty to deny that he is in as a tenant, if the landlord chooses to hold him to that relation. If the tenant may hold over for two weeks, and then say he is not a tenant, I see no reason why he may not give the same answer after holding over as many months or years. The plaintiff's counsel regards the holding over as only presumptive evidence of the continuance of the tenancy, which would have been sufficiently rebutted by the offered proof that the plaintiff, before his term ended, refused to keep the property another year, even at a reduced rent. But such are not my views. I do not think this a case for balancing presumptions, but one where the act of the plaintiff in holding over has given the defendants a legal right to treat him as tenant; and that it is not in his power to throw off that character, however onerous it may be." A number of years later, in the case of Schuyler v. Smith, 51 N. Y. 309, the defendants had held over for the period of three weeks after the expiration of the lease, and they opposed the claim of the plaintiff to hold them as tenants for the whole year, upon the ground that they had given him notice, before the expiration of the term, that they did not intend to keep the premises for another year, and with his knowledge, had made arrangements to occupy other premises. Judge Earl, relying on the rule of law as settled by Conway v. Starkweather, and since recognized by other cases, that, where a tenant holds over after the expiration of his term, the law will imply an agreement to hold for a year upon the terms of the prior lease, overruled their contention, and said: "The safe and just rule I believe to be the one established by authority,—that a tenant holds over the term at his peril, and the owner of the premises may treat

him as a trespasser or as a tenant for another year upon the terms of the prior lease, so far as applicable." Still later, in Adams v. City of Cohoes, 127 N. Y. 175, 28 N. E. 25, Judge Potter, delivering the opinion of this court in the Second division, discussed this question in the light of the authorities, and observed that: "So absolute is the implication, from holding over for a few days only, of a hiring for another year, that the tenant will not be excused from the payment of rent, even where he gave the landlord notice before the end of the term that he did not intend to hire for another year, and had hired other premises, which would be ready for his occupancy in a few days." Finally, we have the case of Haynes v. Aldrich, 133 N. Y. 287, 31 N. E. 94, where the holding over by the defendant was from the 1st to the 4th of May, and it was sought to be excused upon these facts, viz.: That the 1st day of May was a holiday; that on the 2d day of May there was difficulty in engaging trucks, and that a sick boarder could not be removed with safety until the fourth day. Judge Finch discusses, in his opinion, the efficacy of such a defense somewhat elaborately, and, referring to the rule as well settled by authority that where there is a holding over by the tenant the law will imply an agreement to hold for a year upon the terms of the prior lease, makes the following observations upon the argument of the appellant: "The appellant does not deny the rule, but seeks to qualify it so as to mean that it is only when the tenant holds over voluntarily, and for his own convenience, that the landlord's right arises, and that it does not so arise when the tenant holds over involuntarily, not for his own convenience, but because he cannot help it. I am averse to any such qualification. It would introduce an uncertainty into a rule whose chief value lies in its certainty. The consequent confusion would be very great. Excuses would always be forthcoming, and their sufficiency be subject to the doubtful conclusions of a jury, and no lessor would ever know when he could safely promise possession to a new tenant." Again, he says that: "If the rule in this case seems to involve a hardship, that is sometimes true of every general rule, however just and wise; but does not justify its abrogation. To sustain this defense would open the door to a destruction of the settled doctrine and tend to involve the rights of both lessor and lessee in uncertainty and confusion."

This is pretty strong language; but the appellants, nevertheless, seek to distinguish the case as an authority, because there it was a subtenant whose illness prevented the surrender of possession, and the question was reserved whether there might not be an inevitable delay, in no manner the fault of the tenant, which would serve as a valid excuse. It is true that there is that much of a distinction between the two cases, but I think the distinction to be somewhat shadowy, so far as the excuse for not yielding up the premises promptly is concerned, and I agree with the reasoning of the opinion at the appellate division in the present case, that "no such qualification should be, or could safely be, imported into the absolute rule of law. It would make the landlord, rather than the tenant, suffer by reason of a misfortune to the tenant, which he, and not the landlord, should bear the burden of." It seems to me that Judge Finch, in Haynes v. Aldrich, has given a convincing reason against importing any qualification into a well-settled rule of law, by which its application might be rendered uncertain according to the facts pleaded by the tenant. Since the leading case of Conway v. Starkweather, I am not aware of any qualification of the rule having been admitted, and I think that, if a case arises in which it operates harshly, the misfortune is one which, for the sake of the stability of the rule, should be borne by the tenant, rather than by the landlord. The underlying principle is that the rights of the parties are determined by their engagements, and effect must be given to the contract. The doctrine, as settled by the decisions of the courts of this state obtains in many other jurisdictions. Cloth Co. v. Gardner, 99 Ill. 151; Moore v. Beasley, 3 Ohio 294; Vrooman v. McKaig, 4 Md. 450; Bacon v. Brown, 9 Conn. 334; Hemphill v. Flynn, 2 Pa. St. 144; Wolffe v. Wolff, 69 Ala. 549.

This is in no sense to be considered like a case where performance of a condition is prevented by the act of God, nor one where the discharge of an obligation was not fully intended by the parties. It is simply that of a contract which, by its terms, gave the occupancy and use of the premises of the owner for a specified term, and under specified conditions, which fixed the rent to be paid, and which contained the covenant of the lessee to quit and surrender the premises at the expiration of the demised term. The distinction is well settled between an obli-

gation or duty imposed by law and that created by covenant of the party. In the former case, if the party is disabled from performing without any default of his own, the law will excuse him. Illustrations of this are where waste to a tenement is caused by its destruction by tempest or by enemies, or where the contract is for personal services, and the condition of continued existence is raised by implication. But where the party creates a duty by his own contract he is bound to make it good, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract. 2 Saund. 422, note 2; 21 Pick 417, 441; 47 N. Y. 62, 64.

Of course, there was nothing to submit to the jury, and the defendants did not request a submission. All the facts for a judgment were stipulated when the case came on for trial, and they presented the one question for the court whether, in law, they established the plaintiff's right to the rent demanded. I think the judgment should be affirmed, with costs.

O'BRIEN and MARTIN, JJ., read for reversal, etc. PARKER, C. J., and HAIGHT, J., concur. GRAY, J., reads for affirmance, and BARTLETT and VANN, JJ., concur.

Judgment reversed.

CHAPTER X.

TERMINATION OF TENANCY.

Tenancy from Year to Year. Notice to Quit.

HUNTER v. FROST.

47 Minn. 1, 49 N. W. 327. 1891.

Appeal from district court, Ramsey county: Egan, judge.

MITCHELL, J. The plaintiff leased to defendant a tenement for the term of 13 months from April 1, 1888, for an agreed rent of $540 per annum, payable in equal installments of $45, in advance, on the first day of each month. The defendant entered and occupied the premises during the term, and after its expiration held over and continued in possession, and paid rent to the plaintiff, in accordance with the terms of the lease, up to and including the month of November, 1889. Several days prior to October 30, 1889, the defendant served upon plaintiff written notice that he would vacate the premises on November 30th next ensuing. In pursuance of this notice he vacated them, and has not since that time occupied them or paid rent. This action is to recover rent from December 1, 1889, to May 1, 1890. It is not questioned but that at common law the defendant, by holding over after the end of the term without any new agreement, and paying rent according to the terms of the prior tenancy, which was accepted by the plaintiff, became a tenant from year to year, and that this tenancy could not be terminated by either party, except upon due notice (at common law, six months) terminating at the end of the first or any subsequent year (May 1st). But defendant's contention is that tenancies from year to year have been abolished by the statutes of this state, and converted into tenancies at will, which may be terminated at any time by either party by giving the length of notice provided by Gen. St. 1878, c. 75, § 40, which, in this case, would be one month, the rent reserved being payable

monthly. While tenancies from year to year are the creation of judicial decisions, based upon principles of policy and justice, out of what were anciently tenancies strictly at will, terminable at any time by either party without notice, yet such tenancies had become so well established and so fully recognized in the common law that it would naturally be supposed that, if it had been intended to convert them into mere tenancies at will, it would have been done by express and clear language, and not left to mere inference or implication. We think we are safe in saying that, although our statutes bearing upon the subject have always been the same as now, it has never been the understanding of the bar of the state that they had introduced any such radical change in the law as that now contended for. Evidently this court, in considering the cases of Gardner v. Commissioners, 21 Minn. 38, and Dayton v. Craik, 26 Minn. 134, 1 N. W. Rep. 813, assumed that tenancies from year to year still existed in this state. It was squarely so decided in Smith v. Bell, 44 Minn. 524, 47 N. W. Rep. 263, although the question was not very fully argued in that case, and we would not feel bound to follow it if fully convinced that it was wrong.

Counsel for defendant does not claim that there is any express provision of statute abolishing such tenancies, but he relies on certain provisions which he claims effect that result by implication. The first is Gen. St. c. 45, § 1, dividing estates in land into estates of inheritance, estates for life, estates for years, estates at will and by sufferance; the argument being that, as estates from year to year are not named, therefore they are impliedly abolished. The next is Gen. St. c. 75, § 40, which provides that all estates at will may be determined by either party by three months' notice in writing for that purpose given to the other party, and, when the rent reserved is payable at periods of less than three months, the term of such notice shall be sufficient if it is equal to the interval between the times of payment. It is argued that by this the legislature intended to provide for the termination of all estates which did not terminate themselves without notice, and made provision for all the estates, which it recognized, which did not terminate themselves, to-wit., estates at will. Reference is also made to Gen. St. c. 84, § 11, governing summary proceedings

for the recovery of possession by a landlord. It is said that this was evidently intended to give a landlord a summary remedy whenever the relation of landlord exists, but, as the statute only refers to two classes of cases in which the remedy may be employed, when the tenant is not in arrears of rent, to-wit, when the tenant holds over after the termination of the time for which the premises were demised, and where a tenant at will holds over after the determination of any such estate by notice to quit, therefore, if tenancies from year to year still exist, the tenant in such cases could only be evicted by an action of ejectment. It seems to us that counsel has been led into error by failing to duly consider the state of the common law when the statutes were passed, and by assuming that, when they speak of tenancies at will, they refer exclusively to tenancies strictly at will; that is, those which, but for the statute in reference to notices to quit, would have been terminable at any time by either party without notice. It was determined very anciently by the common law, upon principles of justice and policy, that estates at will were equally at the will of both parties, and neither of them was permitted to exercise his will in a wanton manner, and contrary to equity and good faith, but that they could only be terminated by notice for a longer or shorter period, depending usually upon the nature of the original demise. At first there was no other rule but that the notice should be a reasonable one. Because of the uncertainty of this rule, the courts early adopted, as far as possible, some fixed period as being reasonable. In those tenancies which, from the nature of the original demise, they construed to be tenancies from year to year, the courts adopted six months as a reasonable notice, holding that such tenancies could only be determined by a notice of at least six months, terminating at the expiration of the first or any succeeding year. And in those cases which did not come within the class of tenancies from year to year, because by implication for some definite period less than a year, the rule was generally adopted that the time of notice should be governed by the length of time specified as the interval between the times of payment of rent, and should be equal to one of these intervals, and must end at the expiration thereof. The result was that at common law estates at will, in the strict sense, became almost extinguished at a very early date, under the

operation of judicial decisions. Indeed, it would have been difficult to conceive of an instance of such a tenancy, except where created by the express contract of the parties to that effect. But they still remained substantially tenancies at will, except that such will could not be determined by either party without due notice to quit. The enumeration or classification of estates adopted by our statutes is but declaratory of that found in all writers on the common law, even after the doctrine of tenancies from year to year had been fully established by the decisions of the court. Estates in land, less than freehold, have always been classified as of three sorts: (1) Estates for years; (2) estates at will; (3) estates by sufferance. 2 Bl. Comm. 139. This classification was first incorporated in statutory form in the old Revised Statutes of New York, and from them borrowed successively by Michigan and Wisconsin, and perhaps other states; but in none of them was it ever held, or even suggested, that the statute affected or in any way changed the common law as to tenancies from year to year. Did the statutory enumeration necessarily exclude tenancies from year to year, there would be much force in defendant's argument. But, so far from this being the case, they may be included in either estates for years or estates at will, or both, as they possess many of the qualities of each. A tenancy from year to year, though indeterminate as to duration until notice given, has most of the qualities and incidents of a term for years, and, when notice has been given, the term is as much fixed for a definite period as any term for years. A tenant from year to year has a lease for a year certain, with a growing interest during every year thereafter, springing out of the original contract, and parcel of it. Such an estate is not determined by the death of either lessor or lessee; it is assignable and demisable, and may be pleaded as a term. But, although it has many of the qualities of a term for years, yet it is, as already remarked, substantially a tenancy at will except that such will cannot be determined by either party without due notice to quit, terminating at the end of a year. 1 Woodf., Landl. & Ten. 219. For purposes of notice to quit, it is a general tenancy at will. 2 Tayl., Landl. & Ten., § 467, and cases cited. And for purposes of general classification it is treated as a species of tenancy at will, and as properly so as are those tenancies which by implication are held to be for

some period less than a year, as from quarter to quarter, or from month to month, where notice to quit is also necessary in order to terminate them; the only difference being as to the length of the notice and the time it should terminate. Notwithstanding what was decided in Smith v. Bell, supra, we have come to the conclusion, upon fuller examination, that the provisions of chapter 75, § 40, in relation to notices to quit, were intended to apply to all estates which do not terminate themselves without notice, and that for the purposes of such notices a tenancy from year to year is a tenancy at will. In some of the cases cited by plaintiff it was held, as in Smith v. Bell, that similar statutes apply only to the notice required to terminate a tenancy at will, and have no application to a tenancy from year to year. In one of these cases it is said that the purpose of the statute was to give tenants at will the right to the notice therein specified before they could be dispossessed, whereas, before such enactment, they were not entitled to any notice whatever; in other words, that the statute was to give the tenant the right to notice in cases which, but for the statute, would have been tenancies strictly at will. It seems to us that, in placing this construction upon such statutes, the courts have entirely overlooked the fact that tenancies strictly at will had already practically ceased to exist, except where the parties had expressly contracted that the tenancy might be terminated at any time without notice; and as in such cases the contract of the parties, and not the statute, would control, the result would be that such a construction would render the statute meaningless. We have therefore reached the conclusion that the description of estate commonly known as a "tenancy from year to year" is comprehended in the term "estates at will," as used in chapter 75, § 40. But this section has reference only to the length of notice, and does not assume to otherwise change or affect the nature of the tenancy, or the existing rules of law as to when the notice should terminate. For example, where, by implication, the tenancy is from quarter to quarter, or from month to month, the rent being payable quarterly or monthly, the notice must still terminate with the quarter or month; and, where the tenancy is from year to year, the notice must terminate with a year, although the length of it may now be shorter than six

months, as formerly required at common law. Consequently, while the notice given by defendant in this case was sufficient as to length, yet it was wholly ineffectual, because not terminating at the end of a year. There is nothing in the point that there can be no such thing as a tenancy from year to year in this state because of the statute of frauds. Gen. St., c. 41, § 10. The courts have uniformly held that tenancies from year to year were not affected by such a statute. The cases from Massachusetts and Maine are not in point, because expressly placed upon their statutes providing that an estate or interest in land, created without an instrument in writing, "shall have the force and effect of an estate at will only."

Judgment affirmed.

LEADING ILLUSTRATIVE CASES LAW OF IRRIGATION AND WATER RIGHTS

CHAPTER II.

RIGHTS OF APPROPRIATION OF WATER.

Appropriation Always the Rule in the Arid Parts of the Country.

UNION MILL & MINING CO. v. DANGBERG.

81 Fed. 73. 1897.

HAWLEY, District Judge. This is a suit in equity to obtain a decree against the respondents for the alleged wrongful diversion of the water of the Carson river, to complainant's injury and damage. The Carson river is a natural water course, having its source or head in the state of California, and running through the Carson valley, in Douglas county, Nev., to the "sink of the Carson," in Churchill county, where its water sinks and disappears. The river has two branches or forks, designated as the "East Fork" and the "West Fork," and there are many tributaries, branches, and sloughs which connect therewith, through which the water flows every month in the year. The headwaters of both of the main branches rise in California, flow into Carson valley, and unite at Boyd's Bridge, and thence flow in a single channel to the sink, a distance of over 100 miles. Above the main junction there are branches and sloughs from the East Fork, which flow into the West Fork.

Complainant claims the right to sufficient water of the Carson river to run its mills (1) upon the ground that it is a lower riparian proprietor upon the river; (2) upon the ground that it is a prior appropriator of sufficient water of the river to propel the machinery of its mills; and (3) as against several of

the respondents by reason of the decrees of this court and of the state court decreeing to it and its grantors a sufficient quantity of water for such purposes, and perpetually enjoining such respondents and their grantors from the use of such water, to complainant's injury and damage. The respondents admit the diversion of the water, and claim the right to divert all the water of the river (1) by reason of their being riparian owners along the upper course of the river above complainant's mills; (2) by reason of their being prior appropriators of the amounts of water respectively claimed by them; and (3) by prescriptive use, to complainant's injury, of the respective amounts of water claimed by them for more than five years prior to the bringing of this suit.

The testimony as to the use of the water by the respective parties covers a period of time of over 30 years, during which there has been more or less litigation concerning the rights of the parties. It includes the locations and titles of each of the seven mills of which complainant is the owner or part owner, the size and capacity of its ditches, and the amounts of water necessary for it to use, so as to enable it to properly and successfully run its mills. It also embraces the respective titles to the land of the various respondents, the time when their land was first taken up, when the water was first used for purposes of irrigation, and the amount of water appropriated and required for the beneficial use of irrigating their lands. The testimony includes a history of the whole country from the headwaters of the Carson river to its sink. There is an unusual amount of conflict in the testimony, especially as to the amount of water flowing in the river at various points at different seasons of the year, of the capacity of the different ditches, the amounts of water used by the respective parties when first used, and upon nearly every other material fact in the case. A general idea of the extent of this conflict in the evidence is made manifest by the fact that abstracts made therefrom, and set forth or referred to in the briefs of counsel, for the convenience of the court, cover about 1,000 pages of typewritten matter. From this statement it is apparent that the court, having due regard to the compass of its opinion, and the limits of its own time and patience in preparing it, cannot discuss at length the questions arising from such conflict, and will be compelled, in many instances, to simply

state its conclusions upon the facts, and devote most of its time and space to a review of the many intricate, novel, and interesting legal principles, including nearly every question of law pertinent to water rights, which are involved in the decision of this case.

Before proceeding with the discussion of the case upon its merits, there are certain preliminary questions that have been presented and are urged with much force, by the respondents' counsel, touching the right of the complainant to maintain this suit on account of the misjoinder or nonjoinder of certain parties, which will be first disposed of. * * *

1. It is contended that complainant ought not to be permitted to maintain this suit without making its co-tenants parties thereto. This contention cannot be sustained. It does not affect the jurisdiction of the court, but addresses itself solely to the policy of the court. Elmendorf v. Taylor, 10 Wheat. 152, 166. It is not shown either by the pleadings or the proofs herein that any injury will result to respondents by the failure of complainant to make its co-owners in the mills parties to this suit. Complainant's interest is several. There is but a unity of possession. Its estate is capable of being injured, and it is entitled to have it protected from irreparable injury, without regard to the action of its co-tenants. The co-tenant is not an indispensable party to the determination of its rights. The Debris Case, 16 Fed. 25, 34; Railroad Co. v. Ward, 2 Black, 485; Hewitt v. Story, 12 C. C. A. 250, 64 Fed. 524; Himes v. Johnson, 61 Cal. 259; Water Co. v. Perdew, 65 Cal. 447, 452, 4 Pac. 426.

2. It is claimed that the Comstock Mill & Mining Company, the owner of the Eureka Mill, on the Carson river, ought to have been made a party complainant or respondent, and that all of the farmers diverting water from the Carson river below the Rock Point Mill, and the farmers above the Rock Point Mill and below the Merrimac Mill, and the farmers in Carson valley taking water from the tributaries of the Carson river, should have been made parties respondent, and that this suit cannot be maintained without the joinder of all such parties. This suit is not brought to determine the amount of water which each respondent is entitled to divert and use for the purposes of irrigation. It is a suit instituted for the purpose of determining complainant's rights to a specific quantity of the waters of the Carson river,

and to obtain a decree as against all parties who are asserting any right to such waters, to its injury and damage. This being the nature of the suit, complainant is only required to bring such parties before the court as interfere with its rights. The Comstock Mill & Mining Company does not appear to claim any right to the water of the river adverse to complainant. It could not properly have been made respondent, and the attention of the court has not been called to any principle of law which would authorize or compel it to be made a party complainant in order to prevent its commencing any suit against any party who might hereafter interfere with any of its rights. No relief is sought or claimed against any of the farmers on the river below the mills, or between the mills, or as against the parties using water on the small tributaries for irrigation between complainant's mills and the state line. Where no relief is sought against persons who are not connected in interest with the subject-matter of the suit, they should not be made parties to the litigation.

3. It is argued that inasmuch as the respondents who are made parties to the suit do not claim the water of the river jointly, or by any common right, they cannot be jointly sued, and the complainant is not therefore entitled to the remedy it seeks to obtain in this suit. It is true that the respondents deny that they have entered into any combination to divert any of the waters of the river to complainant's injury or damage, or that they jointly or in common divert or use said water, and allege that they claim individual, distinct, and separate rights independent of each other; but the pleadings and the proofs, without any conflict, distinctly show that the results of respondents' acts are such as to make their individual diversion of the water injurious to complainant's rights, if the complainant is entitled to any prior rights to the water. Their claims are of the same common character, in that they are adverse to complainant. They are therefore all properly united as respondents, because they all divert water from a common source, the Carson river, above the mills, and claim the right to divert it as against the complainant. These conflicting rights, whatever they may be, can be determined by one suit. Complainant might not be able to maintain its suit against them singly, for it may be that no one of the respondents acting individually has deprived complainant of all the water to which it is entitled. Complainant is only entitled, if at all, to a

certain amount of the water of the river, and it is by the action of all the respondents that it has been deprived of the water to which it claims to be entitled. Each respondent claims the right to divert a given quantity of water. The aggregate thus claimed so reduces the volume of the water in the river as to deprive complainant of the amount to which it is entitled. To this extent, even if there is no such unity or concert of action or common design in the use of the water to injure complainant, there is certainly such a result in the use of the water by the respondents as authorizes complainant to maintain this suit, upon the ground that the action of all the respondents has produced and brought about the injury of which it complains. Every one who contributes to such injury is properly made a party respondent.

As was said by the court in Saint v. Guerrerio, 17 Colo. 448, 453, 30 Pac. 335, 337:

"Interference with the prior right of a party to the use of water for irrigation is unlike most private injury for which relief may be had by injunction. Priority of right to the use of water from a natural stream is a right peculiar to its nature. A party entitled to such priority, unless he can show that he is entitled to all the water of the natural stream, cannot, in the nature of things, identify certain specific water as belonging to himself while the same is running in the natural channel. Being entitled only to a certain quantity of the water, less than the whole, it is only after a proper diversion of such quantity into his own separate ditch or lateral that the prior appropriator can be said to have title, in kind, to the specific water thus diverted. * * * Keeping this principle in view, it follows that if plaintiff had, by priority of appropriation, actually acquired the better right to the use of the water of the natural stream than either or all of the several defendants, he was entitled to have such priority protected against their acts, whether joint or several, and for that purpose was entitled, if necessary, to join all as defendants in one action. Plaintiff did not claim a prior right to the use of all the water in the natural stream, and the amount diverted by any single defendant might not interfere with plaintiff's use; hence he might not be able to maintain an action against any one of the defendants separately for diverting the water. So, plaintiff might not be able

to show that any two or more of the defendants acted jointly in diverting the water; nevertheless, he might be able to show that the result of their several diversions in the aggregate was to deprive him of its use altogether. The joint result of their several acts would, under such circumstances, justify their joinder as defendants."

The following additional authorities sustain the right of complainant to maintain this suit against the respondents: Blaisdell v. Stephens, 14 Nev. 17; Hillman v. Newington, 57 Cal. 56, 63; People v. Gold Run Ditch & Min. Co., 66 Cal. 138, 4 Pac. 1152; Miller v. Highland Ditch Co., 87 Cal. 430, 25 Pac. 550; Foreman v. Boyle, 88 Cal. 290, 26 Pac. 94; The Debris Case, 16 Fed. 25; Woodruff v. Mining Co., 8 Sawy. 628, 16 Fed. 25; Id., 27 Fed. 795, and authorities there cited.

4. It is next claimed that the farmers residing in California, who are not within the jurisdiction of this court, and who are diverting the water from the East and West Forks of the Carson river, in said state, are indispensable parties to this suit. This proposition is untenable. If the parties were within the district of Nevada, where the suit is brought, it might be the duty of the court to compel complainant to bring them into court; but it does not necessarily follow that this suit cannot be maintained without them. They are proper, and perhaps necessary, parties, but they are not indispensable parties. The rights of the complainant and of the respondents before the court can be determined without them, and they will not in any manner be affected by the decree in this suit. This court must deal with the situation of the parties as it finds them, and proceed to determine the rights of the persons within its jurisdiction who have been properly brought before it, where their rights can be determined without bringing in other parties who would oust the court of its jurisdiction.

Equity rule 47 was evidently adopted to bridge over the difficulties that might arise in all cases of this character. It reads as follows:

"In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction

of the court as to the parties before the court, the courts may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

In Payne v. Hook, 7 Wall. 425, 431, the court said:

"It is undoubtedly true that all persons materially interested in the subject-matter of the suit should be made parties to it; but this rule, like all general rules, being founded in convenience, will yield whenever it is necessary that it should yield in order to accomplish the ends of justice. It will yield, if the court is able to proceed to a decree, and do justice to the parties before it, without injury to absent persons equally interested in the litigation, but who cannot conveniently be made parties to the suit. Coop. Eq. Pl. 35. The necessity for the relaxation of the rule is more especially apparent to the courts of the United States where oftentimes the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever."

If a case in equity can be completely decided as between the litigant parties, the fact that there are other persons residing in another state who might have been made parties if they could have been reached by process should not prevent a decree as to all parties who are within the jurisdiction of the court. Joy v. Wirtz, 1 Wash. C. C. 517, Fed. Cas. No. 7,554; Abbot v. Rubber Co., 4 Blatchf. 489, Fed. Cas. No. 9; Harrison v. Urann, 1 Story 64, Fed. Cas. No. 6,146; Elmendorf v. Taylor, 10 Wheat. 152, 168; Mallow v. Hinde, 12 Wheat. 193, 197; Vattier v. Hinde, 7 Pet. 252, 262; Shields v. Barrow, 17 How. 130, 139; Kennedy v. Gibson, 8 Wall. 498; Williams v. Bankhead, 19 Wall. 563, 571; Hotel Co. v. Wade, 97 U. S. 13, 21; Marco v. Hicklin, 6 C. C. A. 10, 56 Fed. 549, 553; Story, Eq. Pl. §§ 78, 79.

5. Have the respondents acquired any rights to the use of the water of the river as against complainant by prescription? The discussion of this question will, for the first time, bring to light a glimmering of the fact, which, sooner or later, will be made manifest and clear, that the entire controversy as to the right to the use of the water between the respective parties is really confined to a period of about three months in the year, known as the "summer months" or "dry season." In the answer of respondents it is alleged "that continuously, for more than five

consecutive years before the commencement of this suit, under claim of right and title thereto, each of the defendants have severally, openly, peacefully, uninterruptedly, and with the knowledge of the complainant, and adversely to the complainant and to all the world, and to the injury of complainant, taken, appropriated, and used for domestic purposes, and for watering their stock, and for the irrigation of their said land and the crops thereon a portion of the water of said Carson river, and as much as was necessary or required for said purposes." This averment is broad enough to cover the entire time. But the specific contention of counsel in summing up on this point is that respondents "have at all times claimed and used the water adversely to complainant until the middle of July, and for more than five consecutive years before suit, and their claim or right to have such use has been acquiesced in by complainant."

From the mass of testimony introduced upon this point, the court is of opinion that it is clearly shown that complainant never at any time acquiesced in the use of the water by the respondents when it became scarce, or was needed at its mills. Complainant, every year for more than five years prior to the commencement of this suit, employed agents to visit the farmers in Carson valley, with instructions to prevent them from using the water; and such agents did interfere with and interrupt respondents' use every year when the water became reduced in quantity at the complainant's mill, without regard to the month or the day of the month. The truth is that there were no two seasons exactly alike. Ordinarily, the water begins to diminish in quantity between the 1st and 15th of July. This being the fact, there are several witnesses who state that they have no recollection of making any claim to the water before the middle of July; others fix the date before that time; and all agree that they interrupted respondents' use of the water for irrigating purposes when the water commenced to decrease in quantity. The agents would first notify the respondents that complainant needed the water, and request them to cease using it, then protest against their use of the water from the river, and, if unsuccessful in accomplishing the desired results by peaceful methods, they would cut out or open respondents' dams, tear away their head gates, and fill up their ditches. The respond-

ents were usually as active, persistent, and energetic in making repairs, so as to get the water, as the agents were in trying to prevent their using it. In several instances some of the respondents requested the use of the water for a few days, and all reasonable requests in this regard were granted.

The averment in the answer, if sustained by the proofs, was sufficient to establish a prescriptive right in the respondents' use of the water. But there is no evidence to sustain the averment. The mere fact that respondents were never interrupted in the use of the water until the middle of July in each year, if sustained by the evidence, would not give them a prescriptive right unless it was also shown that complainant was, by their acts, deprived of sufficient water to run its mills. An adverse use of water for the statutory period must be open, notorious, peaceable, continuous, and under claim or color of right; for, if any act is done by other parties claiming the water that operates as an interruption, however slight, it prevents the acquisition of any adverse right. Mining Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370; The Mining Debris Case, 9 Sawy. 441, 513, 18 Fed. 753; Winter v. Winter, 8 Nev. 129, 135; Huston v. Bybee, 17 Or. 140, 20 Pac. 51; San Jose v. Trimble, 41 Cal. 536, 542; Lovell v. Frost, 44 Cal. 471; Hayes v. Martin, 45 Cal. 559; Cave v. Crafts, 53 Cal. 135, 138; Ball v. Kehl, 95 Cal. 606, 30 Pac. 780. The burden of proving an adverse uninterrupted use of water, with the knowledge and acquiescence of the party having a prior right, is cast on the party claiming it. American Co. v. Bradford, 27. Cal. 360; Gould, Waters, § 341, and authorities there cited. Any person may obtain exclusive rights to water flowing in a stream or river by grant or prescription as against either riparian owners on the stream or the prior appropriation of the water by other parties. But the right acquired by prescription is only commensurate with the right enjoyed. The extent of the enjoyment measures the right. A mere scrambling possession of the water, or the obtaining of it by force or fraud, gives no prescriptive right; nor can this right be acquired if, during the time in which such right is claimed to have accrued, there has been an abundant supply of water in the stream or river for all other claimants.

In order to enable respondents to maintain a prescriptive right to the flowing water in the Carson river as against com-

plainant, there must have been an uninterrupted enjoyment by them, under claim of right, for the period of five years. There must have been an actual occupation by the diversion and use of the water, to the knowledge and acquiescence of the complainant, such as to occasion damage and give it a right of action. There must have been such a use of the water, and such damage, as would raise a presumption that complainant would not have submitted to it unless the respondents had acquired the right to so use it. Dick v. Bird, 14 Nev. 161; Dick v. Caldwell, Id. 167; Boynton v. Longley, 19 Nev. 69, 76, 6 Pac. 437; Water Co. v. Crary, 25 Cal. 504; Grigsby v. Water Co., 40 Cal. 396, 406; Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, 30 Pac. 623; Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645; Ditch Co. v. Heilbron, 86 Cal. 1, 12, 26 Pac. 523; Black's Pom. Water Rights, § 132; Kin. Irr. §§ 293, 294, 297.

In the application of these principles to the facts of the case under consideration, it clearly appears that respondents have not acquired any right to the use of the water of the Carson river by prescription, as against complainant.

6. We are now brought to a consideration of the interesting and important question as to what rights the respective parties have to the use of the water flowing in the river. Are their rights to be determined by the rules and principles applicable to riparian proprietorship, or be governed solely by the laws, rules and decisions of the courts of Nevada, and of other states in the arid regions on the Pacific coast, touching the doctrines of appropriation of water to beneficial uses and purposes? Should the court follow the suggestion of counsel that some of the parties can claim riparian rights, and others claim the right to divert the water by prior appropriation, and others claim both rights? The difficulty encountered at the threshold of this discussion arises from the character, nature, and extent of the prior decrees entered in this court in Mining Co. v. Dangberg, 2 Sawy. 451, Fed. Cas. No. 14,370, and Mining Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, in this court and in the state courts. These decrees were based upon the riparian rights of the respective parties. The fact is that, at the time such decrees were entered, the rule of riparian rights was held to be applicable to Nevada. Vansickle v. Haines, 7 Nev. 249. Since the rendition of the decrees, that case has been overruled, and the principles

of prior appropriation accepted, as applicable to the existing conditions of the soil and climate of this state. Jones v. Adams, 19 Nev. 78, 6 Pac. 442; Reduction Works v. Stevenson, 20 Nev. 269, 21 Pac. 317. This change is the natural outgrowth of the conditions existing in this state. The climate is dry. The soil is arid. The land is unproductive, without irrigation. When water can be used thereon, it becomes capable of successful cultivation. There are but few streams of water. The benefits accruing to land along the banks of these streams by the mere flow of water in the channel is very slight. The bottom lands that can be irrigated by a diversion of the water, so that it can be turned back into the stream, are of limited extent. A large proportion of the area of land suitable for cultivation would have to remain in its wild and unproductive state, covered only by the natural growth of sagebrush and greasewood, unless the right to appropriate and divert the water of the streams away from the channel for the purpose of irrigating such lands is recognized and secured. The same conditions exist with reference to the necessity of the use of the water for mining, milling, mechanical, manufacturing, municipal, and other beneficial purposes. These conditions and the growing wants and necessities of the people imperatively demanded that such a change should be made. Riparian rights are founded upon the ancient doctrine of the common law. If the law is a progressive science, courts should keep pace with the progress and advancement of the age, and constantly bear in mind the wants and necessities of the people, and the peculiar conditions and surroundings of the country in which they live. In this connection it has been said to be one of the excellencies of the common law that it admits of perpetual improvement, by accommodating itself to the circumstances of every age, and applies to all changes in the modes and habits of society, and that in this respect it will never be outgrown by any refinements, and never out of fashion, while the ideality of human nature exists. State v. McClear, 11 Nev. 66.

7. It may be that the results would be substantially the same under the law of riparian proprietorship as under the law of prior appropriation. The difference would, perhaps, be more in the form of the decree than in the amount of water to which the respective parties are entitled. From any standpoint that

may be taken, it is evident that the former decrees could not be successfully enforced. If this were not true, there would not have been any necessity for this suit. The former decrees, which are pleaded and relied upon by complainant as sustaining its superior rights to the water of the river, were based exclusively upon riparian rights; and if, as argued by complainant's counsel, the decrees make the matter in issue res judicata so far as the original parties to those suits and all persons claiming under them are concerned, there would be an end of the present controversy as to such parties. The decrees in question did not give to complainant any fixed or definite quantity of water. They did not determine the amount of water which was necessary to enable complainant to propel its machinery at its mills. Under the rules of the common law, the riparian proprietors would all have the right to a reasonable use of the water of the river running through their respective lands for the purpose of irrigation. It is declared in all of the authorities upon this subject that it is impossible to lay down any precise rule which will be applicable to all cases. The question must be determined in each case with reference to the size of the river, the velocity of the water, the character of the soil, the number of proprietors, the amount of water needed to irrigate the lands per acre, and a variety of other circumstances and conditions surrounding each particular case; the true test in all cases being whether the use is of such character as to materially affect the equally beneficial use of the water of the stream by the other proprietors.

In Mining Co. v. Ferris, 2 Sawy. 176, 195, Fed. Cas. No. 14,371, the respondents claimed that in a hot and arid climate like Nevada the use of water for irrigation was a natural want; that the upper proprietors on the stream might consume all the water for the purpose of irrigating their land and that such use would be reasonable. The court, in considering this question, said:

"To lay down the arbitrary rule contended for by the defendant, and say that one proprietor on the stream has so unlimited a right to the use of the water for irrigation, seems to us an unnecessary destruction of the rights of other proprietors on the stream who have an equal need and an equal right."

But the right to use water for the purpose of irrigation was expressly recognized. The court said:

"Irrigation must be held in this climate to be a proper mode of using water by a riparian proprietor, the lawful extent of the use depending upon the circumstances of each case. With reference to these circumstances, the use must be reasonable, and the right must be exercised so as to do the least possible injury to others. There must be no unreasonable detention or consumption of the water."

When it is said that such use must be made of the water as not to affect the material rights of other proprietors, it is not meant that there cannot be any diminution or decrease of the flow of water; for, if this should be the rule, then no one could have any valuable use of the water for irrigation, which must necessarily, in order to be beneficial, be so used as to absorb more or less of the water diverted for this purpose. The truth is that under the principles of the common law in relation to riparian rights, if applicable to our circumstances and conditions, there must be allowed to all, of that which is common, a reasonable use. But, if prior appropriation is to prevail, then different rules must be applied. Under the principles of prior appropriation, the law is well settled that the right to water flowing in the public streams may be acquired by an actual appropriation of the water for a beneficial use; that, if it is used for irrigation, the appropriator is only entitled to the amount of water that is necessary to irrigate his land, by making a reasonable use of the water; that the object had in view at the time of the appropriation and diversion of the water is to be considered in connection with the extent and right of appropriation; that, if the capacity of the flume, ditch, canal, or other aqueduct, by means of which the water is conducted, is of greater capacity than is necessary to irrigate the lands of the appropriator, he will be restricted to the quantity of water needed for the purposes of irrigation, for watering his stock, and for domestic use; that the same rule applies to an appropriation made for any other beneficial use or purpose; that no person can, by virtue of his appropriation, acquire a right to any more water than is necessary for the purpose of his appropriation; that, if the water is used for the purpose of irrigating lands owned by the appropriator, the right is not confined to the amount of water used at the time the appropriation is made; that the appropriator is entitled, not only to his needs and neces-

sities at that time, but to such other and further amount of water, within the capacity of his ditch, as would be required for the future improvement and extended cultivation of his lands, if the right is otherwise kept up; that the intention of the appropriator, his object and purpose in making the appropriation, his acts and conduct in regard thereto, the quantity and character of land owned by him, his necessities, ability, and surroundings, must be considered by the courts, in connection with the extent of his actual appropriation and use, in determining and defining his rights; that the mere act of commencing the construction of a ditch with the avowed intention of appropriating a given quantity of water from a stream gives no right to the water unless this purpose and intention are carried out by the reasonable, diligent, and effectual prosecution of the work to the final completion of the ditch, and diversion of the water to some beneficial use; that the rights acquired by the appropriator must be exercised with reference to the general condition of the country and the necessities of the community, and measured in its extent by the actual needs of the particular purpose for which the appropriation is made, and not for the purpose of obtaining a monopoly of the water, so as to prevent its use for a beneficial purpose by other persons; that the diversion of the water ripens into a valid appropriation only where it is utilized by the appropriator for a beneficial use; that the surplus or waste water of a stream may be appropriated, subject to the rights of prior appropriators, and such an appropriator is entitled to use all such waters; that, in controversies between prior and subsequent appropriators of water, the question generally is whether the use and enjoyment of the water for the purposes to which the water is applied by the prior appropriator have been in any manner impaired by the acts of the subsequent appropriator.

These general principles are of universal application throughout the states and territories of the Pacific coast. They have, in one form or another, been declared, upheld, and maintained by a uniform current of decisions in this state. Lobdell v. Simpson, 2 Nev. 274; Mining Co. v. Carpenter, 4 Nev. 534; Proctor v. Jennings, 6 Nev. 83; Barnes v. Sabron, 10 Nev. 218; Simpson v. Williams, 18 Nev. 432, 4 Pac. 1213. The same rules prevail in California: Kelly v. Water Co., 6 Cal. 106; Ditch Co.

v. Vaughn, 11 Cal. 143; Kimball v. Gearhart, 12 Cal. 28; Ortman v. Dixon, 13 Cal. 34; Kidd v. Laird, 15 Cal. 161; Weaver v. Lake Co., 15 Cal. 274; McKinney v. Smith, 21 Cal. 374; Hill v. Smith, 27 Cal. 476; Davis v. Gale, 32 Cal. 26; Water Co. v. Powell, 34 Cal. 109; Nevada Co. v. Kidd, 37 Cal. 283; Osgood v. Water Co., 56 Cal. 571; Mitchell v. Mining Co., 75 Cal. 482, 17 Pac. 246; Ramelli v. Irish, 96 Cal. 214, 31 Pac. 41; Barrows v. Fox, 98 Cal. 63, 32 Pac. 811. In Colorado: Coffin v. Ditch Co., 6 Colo. 443; Sieber v. Frink, 7 Colo. 149, 2 Pac. 901; Wheeler v. Irrigation Co., 10 Colo. 583, 17 Pac. 487; Hammond v. Rose, 11 Colo. 524, 19 Pac. 466; Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028; Platte Water Co. v. Northern Colorado Irrigation Co. (Colo. Sup.), 21 Pac. 711; Strickler v. City of Colorado Springs, 16 Colo. 62, 26 Pac. 313; Combs v. Ditch Co., 17 Colo. 146, 28 Pac. 966; Ft. Morgan Land & Canal Co. v. South Platte Ditch Co., 18 Colo. 1, 30 Pac. 1033. In Oregon: Kaler v. Campbell, 13 Or. 596, 11 Pac. 301; Simmons v. Winters, 21 Or. 35, 27 Pac. 7; Speake v. Hamilton, 21 Or. 3, 26 Pac. 855; Hindman v. Rizor, 21 Or. 112, 27 Pac. 13. In Utah: Munroe v. Ivie, 2 Utah, 535; Irrigating Co. v. Moyle, 4 Utah, 327, 9 Pac. 867; Salina Creek Irr. Co. v. Salina Stock Co., 7 Utah, 456, 27 Pac. 578. In Montana: Woolman v. Garringer, 1 Mont. 535. In Idaho: Conant v. Jones, 32 Pac. 250. See, also, Atchison v. Peterson, 20 Wall. 507; Basey v. Gallagher, Id. 670; Broder v. Water Co., 101 U. S. 276; Hewitt v. Story, 12 C. C. A. 250, 64 Fed. 516; Krall v. U. S., 24 C. C. A. 543, 79 Fed. 241; Gould, Waters, § 228 et seq.; Kin. Irr. § 150 et seq.; Black's Pom. Water Rights, § 15 et seq. * * *

CHAPTER III.

WATER SUPPLIES SUBJECT TO APPROPRIATION.

Natural Streams or Water Courses.

RAIT v. FURROW.

74 Kan. 101, 85 Pac. 934. 1906.

JOHNSTON, C. J. Is the stream in question a natural water course? If it is, the embankment which obstructed its flow is a nuisance which was properly enjoined, but, on the other hand, if it is a vagrant outburst, which temporarily overflowed the surface of the land, it is to be treated as surface water, a common enemy against which Rait was entitled to fence. A water course consists of a channel, with banks, and bed, and running water. There must be a source of supply, a defined channel and permanence of flow. In Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241, a general definition was given: "Again, for a water course there must be a channel, a bed to the stream, and not merely low land or a depression in the prairie over which water flows. It matters not what the width or depth may be. A water course implies a distinct channel, a way cut and kept open by running water, a passage whose appearance, different from that of the adjacent land, discloses to every eye on a mere casual glance the bed of a constant or frequent stream." See, also, Palmer v. Waddell, 22 Kan. 352; Railway Co. v. Dyche, 31 Kan. 120, 1 Pac. 243; Railway Co. v. Riley, 33 Kan. 374, 6 Pac. 581; Railroad Co. v. Morrow, 42 Kan. 339, 22 Pac. 413; Railway Co. v. Steck, 51 Kan. 737, 33 Pac. 601; Railway Co. v. Scott (Kan.), 81 Pac. 1131. East creek, the stream in question, has a well-defined channel, with bed, and banks, in which there has been a steady flow of water since the early part of 1903. Prior to that time the upper part of that stream, which drained the hill country, had a well-defined course, with banks, until it reached the bottom land, from which place it passed down a depression in Furrow's land, and extending to the

land of Rait. In this depression the water followed no distinct course, and there was no well-defined channel. From the facts found it cannot be said that the flow of water through Furrow's land prior to 1903 constituted a stream with the attributes of a water course. Water did issue from some springs, but only in wet weather, and the water which passed down the depression near the springs left no impress of permanent running water. Since the flood of 1903, however, there has been a regular channel, with banks, and bed, and the flow of water has been so steady and persistent as to show that the stream has a well-defined and substantial existence.

It is argued that the supply of water is not so permanent in character as to make it a water course. The court does find that ordinarily the water in the stream does not come from the hills; that it either comes from invisible springs in the bottom of the channel or from seepage, but from which of the two sources the evidence did not disclose. It is argued that seepage is no more than surface water, and that, as the court could not say that springs existed, its finding was the equivalent of a holding that there was no permanent supply. To constitute a water course it is necessary that there be a permanent source of supply. Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519; Jeffers v. Jeffers, 107 N. Y. 650, 14 N. E. 316; Gregory v. Bush, 64 Mich. 37, 31 N. W. 90, 8 Am. St. Rep. 797. The source may be springs (Pyle v. Richards, 17 Neb. 180, 22 N. W. 370; Mitchell v. Bain, 142 Ind. 604, 42 N. E. 230; Wolf v. Crothers [Pa.], 21 Pa. Co. Ct. R. 627) or it may be surface water (Arthur v. Grand Trunk Railroad Co., 22 Ont. App. 89, 95; Beer v. Stroud, 19 Ont. 10; McKinley v. Union County Freeholders, 29 N. J. Eq. 164; Kelly v. Dunning, 39 N. J. Eq. 482; Eulrich v. Richter, 41 Wis. 320; Barnes v. Sabron, 10 Nev. 217; 2 Farnham on Waters, § 457; Gould on Waters [3d. Ed.] § 263), or a pond formed by surface water (Neal v. Ohio River R. Co., 47 W. Va. 316, 34 S. E. 914). If, as the court found, the flow of water was continuous and has the element of permanence, it is immaterial whether it reaches the channel by seepage or from springs. It is enough that there is a living source, a steady supply which is regularly discharged through a well-defined channel made by the force of the waters. Whether the water comes from a spring, subterranean vein, or surface water, it becomes a water course from the point where

it comes to or collects on the surface and flows in a well-defined channel or bed, with such banks as will ordinarily confine the water and cause it to run in a definite and certain direction. The Supreme Court of Ohio, in defining surface water and its transition into a water course, said: "Surface water is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters, whether derived from the surface or springs; and it then becomes the running water of a stream and ceases to be surface water." Crawford v. Rambo, 44 Ohio St. 282, 7 N. E. 431. In Mitchell v. Bain, supra, it was remarked: "Even surface water becomes a natural water course at the point where it begins to form a reasonably well-defined channel, with bed, and banks, or sides, and current, although the stream itself may be very small and the water may not flow continuously. Gould on Waters, § 263; Churchill v. Lauer, 84 Cal. 233, 24 Pac. 107." The question is not to be determined alone from the origin of the water, for streams may be composed wholly of surface water or that which falls in the shape of rain or snow. In Arthur v. Grand Trunk Railroad Co., 22 Ont. App. 89, it is said: "If a stream is traced up towards its source, a point will always be reached where it ceases to be definable by a bed and banks; but, until that point is reached, it must be a water course, whether its origin be a spring or several springs, or the rain or snowfall of a district collected naturally and flowing away for the first time in a visible course or channel. All our lakes, rivers, and streams have their source in the clouds of the sky, precipitated in the form of rain or snow, and the sole question in every case is whether the water thus precipitated has formed for itself a visible course or channel, and is of sufficient magnitude or volume to be serviceable to the persons through or along whose land it flows. It is immaterial that it may be intermittent in its flow, or that at certain seasons of the year there may be little or even no flow of water." So it has been held that, when surface waters collect into a pond, which is of a permanent character, they cease to be surface waters. Neal v. Ohio River R. Co., supra; Schaefer v. Marthaler, 34 Minn. 487, 26 N. W. 726, 57 Am. Rep. 73; Alcorn v. Sadler, 66 Miss. 221, 5 South. 694.

It is plausibly contended that the water has not flowed in the stream for such length of time as to indicate permanence; that, as it has not flowed from time immemorial, it cannot be regarded as an ancient water course. It is not essential that a water course shall have all the characteristics and attributes of every other water course. 2 Farnham on Waters, § 455. It is not uncommon for a stream to leave its channel and make for itself a new course. The test is not the age of the stream, nor the length of time its waters have followed a particular channel, but it is whether it has the characteristics of permanence. The waters of the Missouri river frequently leave portions of its accustomed bed and cut a new channel far away from the former one, and occasionally they shift back again and pass through the old channel. In such cases the new channel does not require great age to give it the character of a water course, and there can be no distinction between that river and a running stream of less magnitude. East creek has been a regular flowing stream in all seasons, wet and dry, since the spring of 1903. While the volume of water is not large, it is large enough to be serviceable, as it flows at the rate of half a barrel a minute, and to throw it back upon the land of the plaintiff would necessarily work great injury. If it had only flowed during freshets, or in wet seasons, there would be more reason to treat it as a temporary stream, but the matter of permanence was a question of fact for the trial court, and, although its existence originated in a flood, and only a year or two ago, the facts stated appear to be sufficient to support the finding of the court.

The fact that East creek does not continue in a definite channel, across Rait's land, and until it reaches the river, is pressed upon the attention of the court. It is not shown to flow through a well-defined, natural channel much beyond Furrow's land, nor that it discharges into another water course. But is it important or necessary that a water course should extend to and find its outlet in another water course, and thence to the sea? Ordinarily a stream of water, flowing in a definite channel, discharges itself into a river or some other water course; but the fact that a stream may spread out over the land, percolate into the soil, or lose itself in some subterranean channel, does not deprive the part which flows regularly through a channel of its character of a water course. In a Vermont case, it appeared that water from

springs ran down a hillside, formed a small pond, and from thence by a distinct course down a ravine to a point where it was discharged upon a meadow. Ordinarily the stream was only two or three inches deep and about six inches wide, and, while the volume of water was small, its distance very short, and its outlet the unbroken surface of a meadow, it was held to be a water course. Hawley v. Sheldon, 64 Vt. 491, 24 Atl. 717, 33 Am. St. Rep. 941. Subterranean currents of water emerge from the ground and flow through surface channels, and, again, running streams sometimes sink away and are no longer traceable on the surface. The outlet of a stream may be unknown, but if its course on the surface, so far as it runs, is well defined, and has the element of permanence, it must be regarded as a water course, and its surface flow at least cannot be interrupted nor diverted from its natural channel. In Mansford v. Ross, 4 New Zealand Law Reports, 290, it is held that a stream which empties itself into a swamp, where all definite channel is lost, and there is a channel emerging from the other side, the stream running into the swamp is a water course, and the owner of the land through which that stream runs cannot divert the water and defeat the riparian rights of those on the lower stream on the other side of the swamp. In Mitchell v. Bain, supra, it is said: "A stream does not cease to be a water course and become mere surface water because at a certain point it spreads over low ground, several rods in width, and flows for a distance without a definite channel, with banks, before flowing again in a definite channel." See, also, Ferris v. Wellborn, 64 Miss. 29, 8 South. 165; Hebron Gravel Road Company v. Harvey, 90 Ind. 192, 46 Am. Rep. 199; Washington Water Co. v. Garver, 91 Md. 398, 46 Atl. 979; Case v. Hoffman, 84 Wis. 438, 54 N. W. 793, 20 L. R. A. 40, 36 Am. St. Rep. 937.

But, whatever may be the rule, as to subterranean currents or waters passing through the ground by percolation, there can be no question but that surface currents of living water, running in defined channels, and having the element of permanence, are to be regarded as water courses, whether the outlets are through defined channels over the surface, or by subterranean channels, or even by percolation, through the earth. In Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497, it was decided that a creek having its source in springs,

which ran a short distance through a natural surface channel, and then discharged into a large slough, which had no natural surface outlet, was a water course, and that the waters running in the surface channel could not be diverted to the injury of the lower owners. The character of the outlet beyond the land of Furrow cannot materially affect the character of the stream flowing through Furrow's land, and that stream, under the findings of the trial court, must be regarded as a natural water course.

The judgment of the court will therefore be affirmed. All the Justices concur.

CHAPTER IV.

HOW APPROPRIATIONS ARE MADE.

Beneficial Uses.

FORT MORGAN LAND & CANAL CO. v. SOUTH PLATTE DITCH CO.

18 Colo. 1, 30 Pac. 1032. 1892.

HAYT, C. J. This is a statutory proceeding instituted for the purpose of procuring an adjudication of priorities of right to the use of water for irrigation in water district No. 1, in Weld county. The petition was filed in the month of November, 1886, by the Platte & Beaver Improvement Company. Upon this petition, at the regular November term, 1886, of the district court of Weld county, an order was made appointing one C. A. Bennett referee. By this order the referee was directed to hear and determine such priorities in accordance with the statute regulating the procedure in such cases. Gen. St. 1883, c. 57. The referee, having duly qualified, soon thereafter proceeded to take testimony; and, this being completed, he filed his report at the regular May, 1887, term of the court. To this report the appellant, the Ft. Morgan Land & Canal Company, filed exceptions. These exceptions were, after argument of counsel, overruled by the court, and judgment was entered in accordance with the report. Twenty-four priorities of appropriation were thus established for the 20 ditches represented at the hearing. Appellant's priority appears as No. 18, and upon this appeal all those adjudged to have senior priorities are joined as appellees.

Under our constitution, the water of every natural stream in this state is deemed to be the property of the public. Private ownership of water in the natural streams is not recognized. The right to divert water therefrom, and apply the same to beneficial uses, is, however, expressly guaranteed. By such diversion and use a priority of right to the use of the water may be acquired. This priority has been declared a property right, and, as such, subject to sale and transfer. Strickler v. City of Colo-

rado Springs, 16 Colo. 61, 26 Pac. Rep. 313. From the first this court has recognized and emphasized the idea that a priority could only be legally acquired by the application of the water to some beneficial use. Hence there must be not only a diversion of the water from the natural stream, but an actual application of it to the soil, to constitute the constitutional appropriation recognized for irrigation. Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, and cases cited. This may now be considered as one of the fundamental principles underlying our system of irrigation. It is too well established to be open to controversy. A diversion unaccompanied by an application gives no right. This principle applied to the record in this case is fatal to the decree rendered by the district court. The capacity of the several ditches enumerated in the decree to convey water seems to have been the criterion by which the court was governed; for, although evidence was taken tending to show the amount of water actually used in irrigation, such evidence seems to have had but slight effect upon the final decree. It is apparent that the capacity of the various ditches outweighed all other considerations. Such capacity, having once been established, together with proof of diversion and the use of a limited portion of water, with a promise to increase such use up to the limit of the ditch within a reasonable time, was sufficient to procure for the ditch a priority for an amount of water equal to such capacity; such priority dating from the inception of the work of construction upon the ditch. The decree is not saved by the proviso restricting the ditch owners from diverting water into their ditches at times when the same is not needed for a beneficial purpose, to the detriment of other later appropriators. This would be the result in the absence of anything in the decree to the contrary. The court erred in awarding priorities to the several ditches in excess of the amount of water actually appropriated at the time the decree was rendered. For instance, it appears from the testimony in the case that the Platte & Beaver Improvement Company was the owner of more than 30,000 acres of land adjacent to their ditch; and, finding it impracticable to obtain either tenants or purchasers for this land, they were about to consummate an arrangement at the time this decree was rendered, in the spring of 1887, whereby the same could be divided among its stockholders, with the object in view of accomplish-

ing a more rapid development of the lands and a more extended application of water to the soil. Counsel say: "It cannot be that, under the peculiar circumstances attending this case, the court will say that the stockholders of the Platte & Beaver Improvement Company, who have, including interest, spent nearly $200,000 in the construction of their ditches, have failed to acquire thereby water rights for their lands. Under the circumstances of this case, they are entitled to additional time."

In support of this position our attention is directed to the following paragraph from the opinion of this court in Larimer County Reservoir Co. v. People, 8 Colo. 614, 9 Pac. Rep. 794: "The supreme court of California (McDonald v. River, etc., Co., 13 Cal. 220) defines the word 'appropriation,' in this connection, as follows: 'This appropriation is the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use.' We consider these definitions applicable to appropriations of water in this state; that is to say, we are of opinion that when the individual, by some open, physical demonstration, indicates an intent to take, for a valuable or beneficial use, and through such demonstration ultimately succeeds in applying the water to the use designed, there is such an appropriation as is contemplated by our constitution and statutes. While a diversion must of necessity take place before the water is actually applied to the irrigation of the soil, the appropriation thereof is, in legal contemplation, made when the act evidencing the intent is performed. Of course, such initial act must be followed up with reasonable diligence, and the purpose must be consummated without unnecessary delay." This language was used in a case where the question under consideration related to the right to utilize the bed of a nonnavigable stream for the storage of water that would otherwise have run to waste, this being a preliminary step to the utilization of the water for irrigation. The claim there advanced was that such act was unlawful per se, without reference to the question as to whether or not the rights of others were injuriously affected thereby. Moreover, the language does not warrant the construction placed upon it by counsel. It expressly states that an appropriation is only consummated in case the water is finally applied to the use designated. No warrant is given for the entry of a decree in advance awarding a priority upon a diversion and promised use,

as has been done in this case. To uphold such a decree would necessitate the abandonment of a cardinal principle that has been announced in many carefully considered cases. This principle in the paragraph next preceding the one quoted from the opinion in 8 Colo. 614, 9 Pac. Rep. 794, is stated in this terse language: "The true test of the appropriation of water is the successful application thereof to the beneficial use designed. * * *" The construction contended for by counsel is so radically and palpably wrong that we deem further argument or additional citation of authorities unnecessary to its overthrow. The decree will be reversed, and the cause remanded, with directions to the district court to allow the parties an opportunity to present further evidence, without prejudice to the evidence already taken. Reversed.

Necessity for Diligence.

SIEBER v. FRINK.

7 Colo. 148, 2 Pac. 901. 1884.

HELM, J. * * * The record contains over 750 folios of evidence, and we cannot analyze the same in this opinion; we shall content ourselves with a statement of the material conclusions of fact to be drawn therefrom. Plaintiffs aver priority of right to the water in controversy through what is known as the "Wilson and Brown ditch"; defendants base their claim thereto upon alleged appropriations thereof by means of the "Old or Becker," and the "Edward P. Smith ditches." A fourth, called the "School Section ditch," is described in the testimony, and will command our attention. The Wilson and Brown ditch was constructed for the purpose of irrigating two tracts of land, owned by Wilson and Brown, respectively. Plaintiff Wheeler is the grantee of Wilson, and plaintiffs Sieber and Hudson hold title under a conveyance from Brown.

The priority of appropriation through the Becker ditch proper is practically conceded, though a suggestion of abandonment is made; it is probably the oldest connecting with the Antelope creek. We do not understand that plaintiffs complain of this appropriation of water; their contention is that defendants cannot use this priority to sustain their right to water through the School Section ditch. We think plaintiffs are right in this respect. The head of the former is on Antelope creek; that of

the latter is on Cottonwood, a tributary of Antelope; both being above the point of confluence of the two streams. The latter was constructed in 1875, yet water was diverted from Antelope creek through the former as late as 1878. From the evidence and maps we conclude that the former extends in a westerly, and the latter in a northerly, direction; they meet and unite, and the water from both may be used in irrigating the same tract of land. But there are two separate and distinct divisions and appropriations of water, dating at different periods; and the rights acquired attach upon the respective dates of appropriation. There is some conflict of testimony as to the time of appropriation through the Wilson and Brown ditch. We are satisfied that the ditch was commenced as early as April or May, 1871, and that it was completed and water turned in by or before the first of August. The appropriation would therefore date from April or May of that year. We accept the rule adopted in California and Nevada in this connection. This rule is stated as follows: "Although the appropriation is not deemed complete until the actual diversion or use of the water, still, if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it." Ophir M. Co. v. Carpenter, 4 Nev. 544; Kelly v. Natoma W. Co., 6 Cal. 109. Water was not appropriated through the Smith ditch until July or August of 1871. If, therefore, there has been no abandonment of the right required by means of the Wilson and Brown ditch, the prior right of plaintiffs over the appropriations through the School Section and Smith ditches is established.

Upon the question of abandonment, the testimony is by no means clear. From 1871 to 1875, according to the proofs, each of the three ditches constructed in 1870 and 1871 was neglected, and probably used but little during one or more of the seasons; but we cannot say that the evidence sufficiently establishes an intention to abandon either of them, or the right to water acquired thereby. A failure to use for a time is competent evidence on the question of abandonment; and, if such non-user continued for an unreasonable period, it may fairly create a presumption of intention to abandon; but this presumption is not conclusive, and may be overcome by other satisfactory proofs. The removal in 1876 of the head of plaintiff's ditch, and change of the point of diversion some 80 feet, does not affect their right

of priority; both points of appropriation were upon the same stream; no change was made in the quantity of water diverted, and no one was injured by the removal; the use and the points of application to such use remained the same. But, it appears from the evidence of Wilson himself, that prior to 1876 no part of the water appropriated through the Wilson and Brown ditch was used upon any portion of the Wilson tract. Of the quantity applied to the irrigation of the Brown ranch we are not satisfactorily advised. There is some proof that water "ran to waste" at the end of the ditch; and it may be that in 1871, and during the succeeding four years, but a part of the water diverted was actually applied to a beneficial use upon the Brown land. If this be the fact, plaintiffs are only entitled to priority for the quantity so used. One of the essential elements of a valid appropriation of water is the application thereof to some useful industry. To acquire a right to water from the diversion thereof, one must, within a reasonable time, employ the same in the business for which the appropriation is made. What shall constitute such reasonable time is a question of fact depending upon the circumstances connected with each particular case.

Plaintiffs Sieber and Hudson are entitled to a decree of priority, and an injunction protecting the same for so much of the water appropriated through the Wilson and Brown ditch as was used previous to 1876, in irrigating portions of the Brown ranch, of which they are the purchasers. But to determine this quantity further proofs must be taken.

It appears that in the summer of 1876 the appropriation of water from the Cottonwood by the School Section ditch was enlarged. Such increase is subject to the right of plaintiff Wheeler as well as Sieber and Hudson, acquired in the early spring of that year, by the reconstruction of their ditch, and division therethrough. But we have no definite means of determining this quantity from the record; further testimony upon this point is also essential.

The decree will be reversed, and the cause remanded, with directions to the district court to take the necessary proof upon the two questions above mentioned, and enter a decree in accordance with the views herein expressed. The costs of the entire litigation will be equally divided between the plaintiffs and defendants.

CHAPTER V.

WATER AND WATER RIGHTS AS PROPERTY.

Ultimate Source of Title.

FARM INVESTMENT CO. v. CARPENTER.

9 Wyo. 110, 61 Pac. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918. 1900.

POTTER, C. J. This suit was instituted in the district court of Johnson county for the purpose of securing a decree quieting the title of plaintiff to the right to use water from French creek for the irrigation of certain lands, as against each and all of the defendants, who, it is alleged, are asserting prior and superior rights to the plaintiff. An appropriation by plaintiff's grantor in the year 1879, and the continued use and application of the water so appropriated, are set out, and in consequence thereof a right superior to the defendants is alleged to reside in the plaintiff. The answer of but one of the defendants is in the record. Admitting the original appropriation alleged in the petition, and the ownership of plaintiff to the water right acquired thereby, if any, the answer, as a separate defense, after disclosing the claim of the answering defendant to the use of certain of the waters of the stream for irrigation purposes by reason of an appropriation in 1883, sets up an adjudication by the state board of control of the rights of the various claimants to the use of the water of said stream on or about October, 1893, in accordance with the provisions of chapter 8 of the Laws of 1890-91; the same being an act entitled "An act providing for the supervision and use of the waters of the state." It is alleged that all the notices required by said act were duly given and published, and that the plaintiff had actual notice, and that the proceedings were conducted in accordance with the statutory provisions, and that neither the plaintiff nor his grantors appeared or submitted any proof of their alleged rights. It is also alleged that by the order of the said board in that proceed-

ing the defendant was awarded a certain priority for a definite quantity of water, for which a certificate was issued to him, and that "no amount of water whatever was awarded or decreed to the plaintiff or to any other person for use upon the lands described in said plaintiff's petition." Wherefore it is averred that the plaintiff has abandoned its rights, and is now estopped from asserting the same. To this defense plaintiff filed a general demurrer. * * *

In this state the doctrine prevails that a right to the use of water may be acquired by priority of appropriation for beneficial purposes, in contravention to the common-law rule that every riparian owner is entitled to the continued natural flow of the waters of the stream running through or adjacent to his lands. The appropriation consists in a diversion of the water by some adequate means, and its application to a beneficial use. Moyer v. Preston, 6 Wyo. 308, 44 Pac. 845. It is doubtful if any questions of graver importance than those affecting water rights are presented for judicial consideration. Notwithstanding the settlement of the fundamental doctrine, and its recognition by our constitution and statutes, the law respecting it, in many of its phases, may be said to be still in course of development; and, compared with other questions which are likely to arise relating to this general subject, it is probable that none will exceed in importance those involved and submitted for determination in this controversy. They strike at the root of the system adopted in this state for the supervision and distribution of the appropriated waters. As introductory to the discussion of the reserved questions, we will undertake a very brief survey of the leading features of local legislation and conditions existing anterior to the framing and adoption of the constitution, and the enactment of the statute out of which the contentions in the case at bar arise.

(Here follows a review of the various statutes of Wyoming, ending with that of 1890.)

Counsel for the plaintiff contend that the act of December 22, 1890, is unconstitutional, in so far as it confers upon the board of control authority to determine the priorities of rights to the use of water. Several reasons are urged in support of such contention. * * *

At the outset, however, it is strenuously insisted that the

declaration contained in the constitution, that the waters of the natural streams, etc., are the property of the state, is meaningless and of no force and effect. It is argued that the state no more than an individual can acquire property by a mere assertion of ownership, and that the United States, as the primary owner of the soil, is also primarily possessed of title to the waters of the streams flowing across the public lands. This contention demands more than a passing notice. So far as any proprietary rights of the United States are concerned, the question would seem to be settled in favor of the effectiveness of the declaration by the act of admission, which embraces the following provision, "and that the constitution which the people of Wyoming have formed for themselves, be, and the same is hereby accepted, ratified and confirmed." McCormick v. Telegraph Co., 25 C. C. A. 35, 79 Fed. 449. In that case the circuit court of appeals for the Eighth circuit of the United States held that, under a similar provision in the act of congress admitting Utah, all the provisions of the Utah constitution were invested with all authority conferred by any act of congress.

But is there not a further and deeper reason for upholding the validity and force of the constitutional declaration? Under the doctrine of prior appropriation, it would seem essential that the property in waters affected by that doctrine should reside in the public, rather than constitute an incident to the ownership of the adjacent lands. Such waters are, we think, generally regarded as public in character. By the civil law the waters of all natural streams were publici juris, and, according to Bracton, that was the rule anciently in England. Kin. Irr., § 53; Gould, Waters, § 6. At the modern common law, public waters are generally confined to those which are navigable, and public rights therein to navigation and fishery, and privileges incident thereto. In the arid region of this country another public use has been recognized by custom and laws, and sanctioned by the courts,—a public use sufficient to support the exercise of the power of eminent domain. Irrigation Dist. v. Bradley, 164 U. S. 112, 160, 17 Sup. Ct. 56, 41 L. Ed. 369. This use and the doctrine supporting it are founded upon the necessities growing out of natural conditions, and are absolutely essential to the development of the material resources of the country. Any other rule would offer an effectual obstacle to the settlement and growth of this

region, and render the lands incapable of continued successful cultivation. The waters for the reclamation of the desert lands must be obtained, in a very large measure, from the natural streams and other natural bodies of water. The common-law doctrine of riparian rights relating to the use of the water of natural streams and other natural bodies of water not prevailing, but the opposite thereof, and one inconsistent therewith, having been affirmed and asserted by custom, laws, and decisions of courts, and the rule adopted permitting the acquisition of rights by appropriation, the waters affected thereby become, perforce, publici juris. It is therefore doubtful whether an express constitutional or statutory declaration is required in the first place to render them public. In a country where the doctrine of prior appropriation has at all times been recognized and maintained, an expression by constitution or statute that the waters subject to appropriation are public, or the property of the public, would seem rather to declare and confirm a principle already existing, than to announce a new one. But, however this may be, we entertain no doubt of the power of the people, in their organic law, when existing vested rights are not unconstitutionally interfered with, to declare the waters of all natural streams and other natural bodies of water to be the property of the public or of the state. Nor do we doubt that the legislature may make a like declaration, when in that particular unrestrained by the constitution. If any consent of the general government was primarily requisite to the inception of the rule of prior appropriation, that consent is to be found in several enactments by congress, beginning with the act of July 26, 1866, and including the desert-land act of March 3, 1877. Those acts have been too often quoted, and are too well understood, to require a restatement at this time, at the expense of unduly extending this opinion. It has been held that the act of July 26, 1866, was rather a voluntary recognition by congress of pre-existing rights, constituting valid claims to a continued use, than the establishment of new rights. Broder v. Water Co., 101 U. S. 274, 25 L. Ed. 790. By these various acts "the obvious purpose of congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common law, which permitted the appropriation of these waters for legitimate industries," and "a state may change the common-law rule, and

permit the appropriation of the flowing waters for such purposes as it deems best." U. S. v. Rio Grande Dam & Irrigation Co., 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136. If, as has been said, the title of the general government to the public lands is that of proprietor, rather than sovereign (Kin. Irr., § 145), it would seem that its rights as such are not greater to the waters of the streams flowing across the lands than those of an individual owner. In Arizona and Nevada the statutes declare the ownership of the public in the waters of the natural streams. Clough v. Wing (Ariz.), 17 Pac. 453; Kin. Irr., § 407. The effect of such a declaration has been determined by the courts of Colorado, whose constitution declares that the unappropriated waters of the streams within the state are the property of the public. In the case of Wheeler v. Irrigation Co., 10 Colo. 582, 17 Pac. 487, Mr. Justice Helm, in delivering the opinion of the court, said: "Our constitution dedicates all unappropriated water in the natural streams of the state to the use of the people, the ownership thereof being vested in the public. We shall presently see that after appropriation the title to this water, save, perhaps, as to the limited quantity that may be actually flowing in the consumer's ditch or lateral, remains in the general public, while the paramount right to its use, unless forfeited, continues in the appropriator." * * *

It was said in McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248, in discussing the subject of tide waters: "In like manner, the states own the tide waters themselves. * * * For this purpose the state represents its people, and the ownership is that of the people in their united sovereignty." See, also, Martin v. Waddell, 16 Pet. 410, 10 L. Ed. 999; Gould, Waters, § 32; Kin. Irr., §§ 51, 53; Bell v. Gough, 23 N. J. Law, 624. "The sovereign is trustee for the public." 3 Kent, Comm. 427; Miller v. Mendenhall (Minn.), 44 N. W. 1141, 8 L. R. A. 89. The ownership of the state is for the benefit of the public or the people. By either phrase, "property of the public" or "property of the state," the state, as representative of the public or the people, is vested with jurisdiction and control in its sovereign capacity.

The constitutional declaration was not intended to interfere with previously accrued rights to use the public waters of the state, and it does not conflict with such rights. It was, however, by all the constitutional expressions, undoubtedly intended that

such rights and all appropriations should be regulated upon the basic principles therein enunciated. That the constitutional provision did not impair rights already accrued is apparent, not only from the accompanying provisions, but from the nature of such rights. Although an appropriator secures a right which has been held with good reason to amount to a property right, he does not acquire a title to the running waters themselves,—except, it may be, to such quantity as shall from time to time have been lawfully diverted, and after diversion may be running in his ditch or lateral. The title of the appropriator fastens, not upon the water while flowing along its natural channel, but to the use of a limited amount thereof for beneficial purposes in pursuance of an appropriation lawfully made and continued. The appropriation is made in the first place upon the basis of public ownership of the water, and is protected, instead of impaired, by the constitutional declaration. There can hardly be any controversy over the power of the state to regulate prior as well as subsequent rights of appropriation. In reference to conflicting deeds to the same tract of land, and the validity of recording acts, it was held in a leading case by the supreme court of the United States that, even where a state has originally granted the land to the first individual owner, there is no contract on the part of the state that the priority of title shall depend solely upon the principles of the common law, or that the state shall pass no law imposing on a grantee the performance of acts not necessary to the legal operation of his deed at the time of its delivery. "It is within the undoubted power of state legislatures to pass recording acts by which the elder grantee shall be postponed to a younger if the prior deed is not recorded within the limited time, and the power is the same whether the deed is dated before or after the passage of the recording act." Jackson v. Lamphire, 3 Pet. 280, 7 L. Ed. 679. All rights acquired by appropriation partake of the same general characteristics; differing essentially only in priority and quantity, and possibly in purpose. Where various rights are connected with the same stream or body of water, a subsequent claim cannot be successfully regulated without including in the regulations all rights. The water to which the use of each attaches is public, and the people as a whole are intensely interested in its economical, orderly, and inexpensive distribution.

It is a matter of public concern that the various diversions shall occur with as little friction as possible, and that there shall be such a reasonable and just use and conservation of the waters as shall redound more greatly to the general welfare, and advance material wealth and prosperity. In a Colorado case it was said: "From the very nature of the business, controversies with reference to the use of water naturally led to unseeming breaches of the peace; and, to avoid these, it was found expedient and necessary to provide complete rules of procedure governing the taking of water from the public streams of the state, and regulating its distribution to those entitled thereto. Authority for such regulations may properly be based upon the principle that, when private property is affected by a public interest, it ceases to be juris privati only." White v. Reservoir Co., 22 Colo. 191, 43 Pac. 1028, 31 L. R. A. 828. From any standpoint, we think it is clear that the declaration that the waters subject to appropriation for beneficial purposes are the property of the state is valid and effectual. * * *

We are not persuaded that the act is void, as conferring judicial power upon the board in violation of the constitution. That the board was expected to exercise quasi judicial functions is apparent from that provision of section 2 of article 8 of the constitution requiring its decisions to be subject to review by the courts. * * *

Although in the statutory proceeding for the determination of water rights the courts obtain jurisdiction only by way of appeal from the decisions of the board of control, all the ordinary remedies known to the law, pertinent to the use and appropriation of water, are open to all interested in such rights, equally with all other persons in respect to any other kind of right or property. The courts possess ample jurisdiction to redress grievances growing out of conflicting interests in the use of the public waters, and to afford appropriate relief in such cases. Nothing can be plainer, it seems to us, than that, in the absence of a previous determination by the board or in the courts of the priorities or rights of claimants upon a particular stream, an interested party may resort to the courts to obtain such relief as he may show himself to be entitled to. The jurisdiction of the courts remains as ample and complete after as well as before an adjudication by the board. But the principle

applies here, as in other cases, that a party may not relitigate a question which has passed into final adjudication. And the courts will not assume, in an independent action, to determine anew the rights of parties, which, as between themselves, have been settled by the decree of the board of control—at least, in the absence of fraud, or a showing of facts sufficient to vitiate a judgment. Under the statutes now in force, there being no provision expressly barring or estopping a claimant failing to participate in the adjudication proceedings, and the decree not being res judicata of the undetermined rights of such a claimant, he is at liberty to assert and maintain those rights in the courts, through the regular medium of some form of procedure recognized by the law for redress of grievances, or the granting of appropriate relief.

WINTERS v. UNITED STATES.

207 U. S. 564. 1908.

MR. JUSTICE McKENNA: * * * Another contention of appellants is that if it be conceded that there was a reservation of the waters of Milk river by the agreement of 1888, yet the reservation was repealed by the admission of Montana into the Union, February 22, 1889, "upon an equal footing with the original states." The language of counsel is that "any reservation in the agreement with the Indians, expressed or implied, whereby the waters of Milk river were not to be subject of appropriation by the citizens and inhabitants of said state, was repealed by the act of admission." But to establish the repeal counsel rely substantially upon the same argument that they advance against the intention of the agreement to reserve the waters. The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. United States v. Rio Grande Dam & Irrig. Co., 174 U. S. 702, 43 L. Ed. 1141, 19 Sup. Ct. Rep. 770; United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662. That the government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of

their grant, leaving them a barren waste,—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.

Appellants' argument upon the incidental repeal of the agreement by the admission of Montana into the Union, and the power over the waters of Milk river which the state thereby acquired to dispose of them under its laws, is elaborate and able, but our construction of the agreement and its effect make it unnecessary to answer the argument in detail. For the same reason we have not discussed the doctrine of riparian rights urged by the government.

Decree affirmed.

MR. JUSTICE BREWER dissents.

Transfer of Rights.

COMBS v. AGRICULTURAL DITCH CO.

17 Colo. 146, 28 Pac. 966. 1892.

Appeal from district court, Arapahoe County.

ELLIOTT, J. (after stating the facts). The writ of mandamus has been held to be an appropriate remedy to compel the delivery of water for purposes of irrigation. In the case of Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142, a judgment awarding the writ was reviewed upon error in this court, and affirmed. In the case of Wheeler v. Irrigation Co., 10 Colo. 582, 17 Pac. Rep. 487, a judgment denying the writ was reviewed upon appeal by this court, and reversed. In the latter case, however, the appeal was prosecuted under the special appeals act of 1885 (Sess. Laws, p. 350). Whether judgments in cases of this kind are appealable under the Code of 1887 may in some cases be a matter of such practical importance. Upon reaching this cause for consideration, we suggested a hearing in limine upon the question of the right of appeal, but counsel for appellee did not present any brief or argument upon the point. Under the circumstances we have concluded to consider the case as though the judgment related to a franchise. Code, § 388. The decision, however, is not to be taken as a precedent upon that question. There may be good reasons why appeals in cases

of this kind should not be allowed, which could not be urged against a review by writ of error.

Upon this review the vital questions are: (1) Was such a state of facts established upon the trial as entitled the petitioner, Combs, to have the defendant ditch company supply him with water for the irrigation of his land, as demanded in his petition? (2) Was any substantial error committed upon the trial by which the petitioner may have been prevented from establishing his claim to the relief demanded?

Under the constitution and laws of this state a ditch company carrying water for general purposes of irrigation cannot arbitrarily refuse to supply water to an actual and bona fide consumer, making seasonable application and offering proper compensation therefor. A refusal to supply water by the carrier, to be justifiable, must rest upon something more substantial than the mere will of the carrier. The constitutional rule that "priority of appropriation shall give the better right as between those using the water for the same purpose" must never be overlooked, though a variety of circumstances and conditions may have to be taken into consideration in determining the claim of an applicant for water in a given case.

That the petitioner, Combs, was in the occupancy of certain agricultural lands, so located as to be conveniently supplied with water from the defendant's ditch; that he requested the defendant to supply him with water necessary for the irrigation of said lands for the season of 1888, and tendered therefor the price fixed by the board of county commissioners; and that the defendant refused to deliver the water,—are matters that were either admitted or practically undisputed on the trial. The defendant attempted to justify its refusal to deliver the water upon the ground that, by the declared objects of its incorporation, it was a mutual company; that it was not organized for the purpose of carrying water for others, for hire; that its only obligation in the matter of carrying water was to supply its stockholders. An inspection of the certificate by which the Agricultural Ditch Company was incorporated, as introduced upon the trial, does not sustain this ground of defense. The certificate shows that the company was organized under the general incorporation act by certain settlers living in the arid district of Jefferson and Arapahoe counties, territory of Colorado, unpro-

vided with water, for the purpose of irrigation, stock-raising, aiding the industrial interests of the country, and other purposes. The certificate further shows "that the objects for which this company is incorporated are to irrigate lands situate in range sixty-nine, townships three and four, and other lands in Jefferson and Arapahoe counties, and territory of Colorado, and for farming, stock-raising, and other purposes"; "that the capital stock of said company shall be twenty thousand dollars, to be divided into two hundred shares of one hundred dollars each." There is nothing in the certificate to indicate that it might not be the legitimate business of the defendant company to carry and supply water for irrigation generally to those occupying lands within the vicinity of the ditch. Hence, we do not have to consider whether a purely mutual company might or might not stand on a different footing.

The defendant offered to introduce in evidence certain of its by-laws, as follows: "(1) No water shall be sold from the company's ditch, except to stockholders. (2) The price of water shall always be as low as is consistent with the permanent maintenance of the ditch. (3) No cash dividend shall be declared on the stock of the company." Such testimony, if it had been admitted, would not have been controlling. A ditch company diverting water from a natural stream for general purposes of irrigation cannot, by any provision or declaration of its by-laws, rules, or regulations, exempt itself or its stockholders from the operation of the state constitution. The unappropriated waters of every natural stream belong to the public, and are subject to appropriation by the people to beneficial use. Priority of appropriation to actual beneficial use, and not mere ownership of stock in a ditch company, gives the better right to such use. Individuals may organize a company, either by or without incorporation, for the construction of an irrigating ditch, and may by such means divert the unappropriated waters of a natural stream. They may provide that their several interests in such enterprise shall be represented by shares of stock. But neither the company nor any stockholder of the company can thus withhold the water from beneficial use, nor reserve it for the future use of junior appropriators to the prejudice of prior appropriators, nor to the exclusion of those who in the meantime may undertake, in good faith, to make a valid appropriation thereof.

Undoubtedly, those who by labor or by the payment of money actually construct an irrigating ditch may thereby acquire a prior right to the water which may be diverted therein, provided they apply the same to beneficial use within a reasonable time after such diversion. But they cannot postpone the exercise of such right for an unreasonable time, so as to prevent others from acquiring a right to the water; nor can they thus acquire a right to dispose of the water contrary to the priority rule. Those who construct ditches and divert water for general purposes of irrigation must within a reasonable time apply the water to beneficial use, or else, upon proper application and for proper consideration, they must dispose of the same to those who are ready to make beneficial use of it. If ditch companies are unwilling to be charged with such duties and responsibilities, they must leave the water in the natural stream. The mere diversion of the water is not an appropriation of it, within the meaning of the constitution. There must be an application of the water to beneficial use within a reasonable time, or the diversion is unlawful. See Canal, etc., Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, and cases there cited. The case of McFadden v. Board, 74 Cal. 571, 16 Pac. Rep. 397, cited and relied upon by counsel for defendant in error, is not in point in this case. The question involved related to a mutual company. It does not appear that any question of priority of right to the use of water was involved. No such question was discussed in the opinion. Nor does the provision of the California constitution referred to in the opinion relate to the subject of prior rights. In a carefully considered opinion recently delivered by Mr. Justice Hayt in the case of Strickler v. City of Colorado Springs, 16 Colo. —, 26 Pac. Rep. 313, this court held that "a priority to the use of water for irrigation is a property right, and may be sold and transferred separately from the land in connection with which the right ripened." It must not be inferred from this language that such priority may be secured by the mere acquisition of stock in an irrigating company, without applying the water to beneficial use. An owner of irrigating stock cannot thus carry prior rights to the use of water in his pocket for an indefinite or unreasonable time, and thereby prevent others from acquiring a bona fide priority by actual use. The ownership of a prior right to the use of water is essentially different from the owner-

ship of stock in an irrigating company. The ownership of the stock, like the title to other property, may be acquired by descent or purchase. The ownership of the prior right can be acquired originally only by the actual beneficial use of the water. The very birth and life of a prior right to the use of water is actual user. A stockholder in an irrigating company who makes an actual application of water from the company's ditch to beneficial use may, by means of such use, acquire a prior right thereto; but his title to the stock without such use gives him no title to the priority. He may transfer his stock to whom he will, but he can only transfer his priority to some one who will continue to use the water. If the law were to be declared otherwise,—if ditch companies were at liberty to divert water without limit, and at the same time make the ownership of stock an absolute condition precedent to the right to procure water from their irrigating canals,—water-rights would soon become a matter of speculation and monopoly, and tillers of the soil would have to pay exorbitant rates for the use of water, or our arid lands would become unproductive. The constitution provides that the water of natural streams may be diverted to beneficial use; but the privilege of diversion is granted only for uses truly beneficial, and not for purposes of speculation. This is evident from the fact that provision is made for establishing reasonable rates to be charged for the use of water by individuals or corporations furnishing the same, the evident purpose of which is that actual and beneficial consumers of water may not be subjected to extortionate demands. Speaking upon this subject, Mr. Justice Helm, in the case of Wheeler v. Irrigation Co., supra, used the following pertinent language: "Any unreasonable regulations or demands that operate to withhold or prevent the exercise of this constitutional right by the consumer must be held illegal, even though there be no express legislative declaration on the subject."

One witness for the defense testified that the water "was prorated according to the shares." The substance of his testimony was that the capital stock of the company consisted of 200 shares; the ditch carried about 6,000 inches of water; hence the stockholders were entitled to use or control the use of 30 inches of water for each share of stock owned by them, respectively. That this was the logic of his testimony was indicated by a remark

of the trial judge during the introduction of the testimony, as follows: "Let me see if I have got this correct. The number of inches of water that any person was entitled to was in accordance with the number of shares that such person had, and not as to the number of acres of land that he had to cultivate." It is not clear, however, that the trial court sanctioned such erroneous view of the law; nor did the defendant rest its defense altogether upon such ground. In so far as the defense was placed upon the ground that the stockholders were actual prior appropriators of water from the ditch to beneficial use, as explained in this opinion, the defense was proper; and if, as a matter of fact, the actual appropriations of water by the stockholders were prior to the application of the petitioner, and if their appropriations were equal in the aggregate to the whole amount of water carried by the ditch, the application of the petitioner was properly refused. If, on the other hand, there was a surplus of water remaining in the ditch after supplying prior appropriators, the petitioner was entitled to be supplied out of such surplus. The legal theory upon which a case of this kind should be tried is very simple, however difficult it may be to apply the law to the evidence. It is plain that the quantity of land and the character of the soil which the appropriators of water from the ditch have under cultivation, as well as their actual prior appropriations of water to the irrigation of such lands, and not the number of shares of stock they may own, are the important matters to be considered in determining such a controversy. In the trial of such an issue it is also important to observe that, no matter how early a person's priority of appropriation may be, he is not entitled to receive more water than is necessary for his actual use. An excessive diversion of water cannot be regarded as a diversion to beneficial use, within the meaning of the constitution. Water, in this country, is too scarce, and consequently too precious, to admit of waste. The constitutional rule of distribution, "first come, first served," does not imply that the prior appropriator may be extravagantly prodigal in dealing with this peculiar bounty of nature. We are aware that it may not be practicable to attain mathematical exactness in measuring the flow of water, but a reasonable approximation to substantial accuracy should be aimed at in determining controversies relating to water supply.

Another witness for the defense, upon his examination in chief, was asked this question: "From your experience as a farmer, and irrigation in connection with it, is there water enough in that ditch now, or has there been for the last two years, to irrigate the lands which have heretofore been irrigated by that ditch?" This question was objected to—First, on the ground that it did not appear that the witness had knowledge; and, second, because the matter embraced in the question was the question then at issue and on trial. The objection was overruled. The ruling was excepted to, and is assigned for error. Without noticing the first ground of objection, it is clear that the objection was well taken upon the second ground, and should have been sustained. The question was not merely introductory; it embraced the very substance of the issue which the court was then trying; and a categorical answer, such as the question called for, would, if accepted by the court, have been a complete determination of the issue. It is an elementary rule that such questions are inadmissible.

In accordance with the foregoing views the judgment of the district court is reversed, and the cause remanded. As was held in Wheeler v. Irrigation Co., supra, this was a proceeding by petitioner to obtain relief for a particular year, merely. Hence the petitioner cannot gain anything by a new trial. It is therefore ordered that he be allowed to dismiss his action, without prejudice. Reversed.

Burden of Proof.

NEW CACHE LA POUDRE IRR. CO. v. WATER SUPPLY & STORAGE CO.

49 Colo. 1, 111 Pac. 610. 1910.

CAMPBELL, J.: * * * The announcement has been repeatedly made by this court that the right to change the point of diversion of a ditch which diverts water from a natural stream in this state for the purposes of irrigation, though a property right, is not an absolute one. It may not be permitted if it works injury to the vested rights of others. Whether or not the right to make the change should be granted depends very largely upon the facts of each particular case. The different

cases are usually so dissimilar in their facts that the determination in one case furnishes but very little, if any, aid in the decision of another. When this cause was being conducted as a suit in equity, the judge of the district court, sitting as a trier of facts, found upon a large mass of testimony that the rights of the defendant in that action would not be injuriously affected by the change, and therefore permitted it to be made. The evidence then taken was, under our order, considered at the second hearing, and upon it and additional proof the referee arrived at the same result, and his findings in the main were approved by the trial court when it overruled the exceptions of the respondents thereto. We therefore have a case where two different judges and a referee have reached the same conclusion, that the change asked for should be granted because the vested rights of others were not thereby impaired. Such findings should not be lightly set aside. It would serve no useful purpose to comment upon or review the great volume of evidence which has been brought up in the transcript. To do so would not be helpful in future cases, and we do not deem it necessary to prolong the opinion or to consume the time that would be necessary therefor. An attentive consideration of the evidence satisfies us that every material finding of fact is sustained by the proof, and we therefore shall not disturb the findings.

Much stress is laid by learned counsel for appellant on the fact that the referee in weighing the evidence and making his findings disregarded the true rule in a proceeding of this kind respecting the burden of proof. They say that this court in Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 Pac. 37, which involved a temporary exchange or loan of water rights, said that the burden of proof rests upon the one who asserts the right to make or enjoy the same, and, while the present proceeding is one concerning the right to change the point of diversion, the same principle should apply. In this contention we think appellants are right.

One who seeks to have made a change in the point of diversion of his ditch should make it appear to the court that the same will not injuriously affect the vested rights of others, although in a sense this may involve proof of a negative. This is clearly indicated in a case decided at the present term. Vogel et al. v. Minnesota Canal & Reservoir Co., 47 Colo. 534, 107 Pac.

CHAPTER VI.

EXTINGUISHMENT OF WATER RIGHTS.

Intention to Abandon.

UTT v. FREY.

106 Cal. 392, 39 Pac. 807. 1895.

SEARLS, C. This is an action to quiet the title of plaintiff to the water of the San Luis Rey river and its tributaries, and more particularly the water of Paubal creek, a branch of said river, and of a certain water ditch taking water therefrom.

* * * * * * * * *

The following statement is essential to a comprehension of the point made and other questions raised by appellant: There was testimony tending to show that as early as 1874 (all the lands now owned by plaintiff and defendant then being vacant, unoccupied public lands of the government of the United States) one Samuel Paubal settled upon the tract of land now owned by the plaintiff, known as the "Paubal Tract," and constructed a ditch from Paubal creek to said tract of land, through which he diverted the water of said creek, and conducted the same to his house and land, where he used it for domestic purposes and for the irrigating of a small vineyard, fruit trees, and several acres which he cultivated in corn, peas, etc. Paubal continued to own and occupy the ditch until 1882 or 1883, when he died. Thereupon Luis Ardillo, a son-in-law of Paubal, without acquiring the legal title thereto by any conveyance, took possession of said land and ditch, and continued to possess, occupy, and use them, including the water of said Paubal creek, through said ditch, until 1887, when he conveyed the land to one Magee, and the ditch and water right to plaintiff. Magee homesteaded the place in 1887, commuted the same April 18, 1889, and received a patent therefor from the United States, dated January 19, 1891. Magee conveyed the Paubal tract of land to plaintiff October 2, 1889. Defendant owns land upon Paubal creek

above the land of plaintiff, upon which he filed his declaratory statement February 11, 1890, and entered the land at the United States land office as a pre-emptor January 6, 1891, and received a patent therefor dated December 26, 1891. The head of plaintiff's ditch for say 240 feet is upon the land patented to defendant. In April, 1892, defendant commenced the construction of a ditch from Paubal creek to his land, completing it in the month of May following, which was capable of carrying 40 inches of water, measured under a 4-inch pressure, and since that time has diverted the water of the creek therein, whereby plaintiff has been deprived thereof. The theory of appellant is that, as Ardillo never succeeded to the title of Paubal, the owner and constructor of the ditch, he had no title which he could convey to plaintiff, and therefore that his deed was inadmissible.

It is true that upon the death of Paubal the legal title to his estate vested in his heirs, subject to administration, and the rights and incidents connected therewith; and the fact that the wife of Ardillo was the daughter and heir, or one of the heirs, of Paubal, did not give to her husband, Ardillo, a right to convey the ditch and water right. We are not, however, called upon to consider the rights of the heir or heirs of Paubal, or any rights derived from or through them. Prior possession of real property is evidence of ownership, and as against those who do not connect themselves with the title such prior possession gives a superior right, although the true title may be outstanding in a third person, or, as in the present case, in the government of the United States. One who, in California, desires to appropriate the water of a stream upon the vacant and unappropriated public lands of the United States for a useful purpose, may do so by the construction of a ditch or other medium of conduit, and actually appropriating the water and conducting it to some point where it can be utilized in fulfillment of such useful purpose; and by so doing he acquires, as against all subsequent appropriators and riparian proprietors acquiring title from the United States subsequent to such appropriation, the right to the quantity of water thus appropriated, and an easement of right of way into and over the public land traversed by his ditch or conduit so constructed and used for such purpose. If one animated by a like desire to appropriate water under like circumstances finds a ditch already constructed to hand, takes

peaceable possession thereof, and appropriates the water for a like or similar useful purpose, he thereby acquires a like right as against all the world, except the true owner, or those holding under or through him. If nature or art has furnished the medium of appropriation, he may avail himself of the gift or labor without being held liable to those having no interest therein, and in no wise connected therewith. To the owner of a ditch thus possessed and used such appropriator must account until his possession and user ripens into a title by prescription or adverse user. His right in such case will depend for priority, as against other appropriators of water from the same stream, upon the date of his possession and appropriation, and not upon the date of the original construction of the ditch and appropriation by some other person under whom he does not hold, and between whom and himself there is no privity of estate. His appropriation in such a case is a new and independent one, and must stand or fall upon its own merits. It follows that when Luis Ardillo, in 1882 or 1883, upon the death of Paubal, entered into possession of the Paubal ditch and land, appropriated the water of Paubal creek therein, and used the same for domestic purposes and for irrigating the land, and continued such user until 1887, he thereby acquired a right thereto which he could convey to the plaintiff, and which, unless lost by voluntary abandonment, was prior in time and superior in right to the claim of defendant to such water, which did not vest in him as a riparian proprietor until 1890, and as an appropriator until 1892. It follows that the deed from Ardillo to plaintiff was properly admitted in evidence. It also follows, for like reasons, that the evidence objected to by defendant, touching the taking of possession and user by Ardillo of the ditch and land of Paubal, without a conveyance, was pertinent and proper. In this connection it is proper to state that the finding of the court (No. 2), in which it is found that the plaintiff and his predecessors in interest have been the owners of the ditch in question since and during the year 1874, is erroneous. The evidence showed that the ditch was constructed by Paubal as early or earlier than 1874, but, as Ardillo did not connect himself with the Paubal title, his right to the ditch cannot receive any support therefrom, and had its inception in his possession and user commencing

in 1882 or 1883. The error is technical, could not harm the defendant, and is not cause for reversal, for the reason that a finding that plaintiff and his predecessors have been the owners of the ditch since and during 1874 is tantamount to a finding that they have been such owners at every moment of time during such period; and, as the evidence supports such findings since 1882 or 1883, it fixes such ownership at a period anterior by some seven years to the inception of any right in defendant.

Abandonment.

Appellant contends that, if the plaintiff or his predecessors in interest ever had any irrigation water right in said ditch, it was lost by abandonment. The right which is acquired to the use of water by appropriation may be lost by abandonment. To abandon such right is to relinquish possession thereof without any present intention to repossess. To constitute such abandonment, there must be a concurrence of act and intent, viz., the act of leaving the premises or property vacant, so that it may be appropriated by the next comer, and the intention of not returning. Judson v. Malloy, 40 Cal. 299; Bell v. Mining Co., 36 Cal. 214; Moon v. Rollins, Id. 333; St. John v. Kidd, 26 Cal. 272; Richardson v. McNulty, 24 Cal. 345; Willson v. Cleaveland, 30 Cal. 192. The mere intention to abandon, if not coupled with yielding up possession or a cessation of user, is not sufficient; nor will the nonuser alone, without an intention to abandon, be held to amount to an abandonment. Abandonment is a question of fact to be determined by a jury or the court sitting as such. Yielding up possession and nonuser is evidence of abandonment, and, under many circumstances, sufficient to warrant the deduction of the ultimate fact of abandonment. But it may be rebutted by any evidence which shows that, notwithstanding such nonuser or want of possession, the owner did not intend to abandon. The finding of the court does not uphold the contention of appellant, and in this respect is correct. The most that can be said in favor of an abandonment is that for several years after the sale by Ardillo of the land to Magee, and the conveyance of the ditch and water right to plaintiff, but little water was used from the ditch for irrigation, and that the ditch became so obstructed by debris and

vegetable matter that it would conduct but a small quantity of water. It was used, however, all along to convey water for domestic purposes and to some extent for the purposes of irrigation. The intention of the plaintiff to retain his right was made plainly manifest by requesting the defendant, who for some time was in the occupancy of the Paubal tract of land, to keep the water running in the ditch; by his effort to sell the water right, and later, when he succeeded to the ownership of the Paubal tract, by planting some 14 acres to olive trees, which could not be nurtured without the water from this ditch; and by his clearing out the ditch and running the water through it, except when prevented by the acts of defendant. No question of adverse possession or adverse user for a period sufficient to constitute a right arises in the case, and under the adjudications of this court in the cases cited, and many others of like tenor and effect, it is not perceived how the court below could with any propriety have found in favor of an abandonment. The declaration of plaintiff in his letter to defendant of April 20, 1893, in which he stated that "the difference between us is only one-sixth of the stream, worth about $200," and which is relied upon by appellant as proof that the plaintiff only claimed one-sixth of the water, was fully explained by plaintiff, where he said he and defendant were trying to compromise; that he had offered to take two-thirds of the water, and in response defendant had proposed that each take one-half of the water. This would leave a one-sixth over which they differed, and thereupon he suggested the folly of a suit at law which would cost $1,000, over a one-sixth which was worth but $200. Nothing seems to have come of the attempt to compromise, and the evidence, if admissible, was entitled to no weight. No estoppel was pleaded, and none was proven. The evidence as to the quantity of water appropriated through plaintiff's ditch ranged from 1 inch to 100 inches. The court found 25 inches as the quantity to which Utt was entitled, and this finding cannot be disturbed. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

CHAPTER VIII.

THE CONSTRUCTION AND CORPORATE MANAGEMENT OF WATERWORKS.

Ditches and Appliances.

CHARNOCK v. HIGUERRA.

111 Cal. 473, 44 Pac. 171. 1896.

VAN FLEET, J. This is an action brought by several riparian proprietors against certain persons above them on the stream, to restrain them from diverting any of the waters of the stream. * * *

1. It is contended by appellants that a riparian proprietor has not, for the purpose of irrigation, the right to raise water by means of pumps. No authorities are cited in support of this contention, and counsel states his inability to find any. So far as we can understand, this argument is based on the meaning of the word "irrigate," which counsel contends is "to convey water by ditches," and on the alleged universal custom in the past to employ only such means in irrigation. As to the meaning of the word "irrigation," counsel cites some doubtful passages from civil law writers; but it is evident that this court, in holding, as it has repeatedly held, that riparian proprietors have the right to use a reasonable proportion of the water of the stream to irrigate their lands, used the term in no such restricted sense. The Latin word from which it is derived means, primarily, to convey water to or upon anything, and, more generally, to wet or moisten anything; and the ordinary definition in our language is to water lands, whether by channels, or flooding, or simply by sprinkling. The mere method of obtaining the water with which to irrigate has nothing to do with the process of irrigation, or the meaning of the word. There was no proof in this case of any such custom as is claimed by appellants; and, if we can take judicial notice of such a matter at all, we are unable to say that pumping has

never been used for such purpose. It may be that, owing to the comparatively greater expense of that method, it has been little used in the past; but, if improvements in machinery have made or shall make that method practicable, we see no reason why riparian proprietors may not, like others, take advantage of such improvements. In fact it has always been considered that the reasonableness or lawfulness of any given diversion of water is in no wise affected by the mere mode of diversion. Thus, in Elliot v. Railroad Co., 10 Cush. 191 (cited with approval in Lux v. Haggin, 69 Cal. 402, 404, 10 Pac. 674), Chief Justice Shaw said, "One man may take water from a perennial stream of moderate size, by means of buckets or a pump,—for the mode is not material,—to water his garden." And in such a case, he says, "the water would be used for irrigation," and such "might be regarded as a reasonable use." So this court has repeatedly held that a prior appropriator of water may change, at pleasure, the place or mode of his diversion, so long as others are not injured by such change. And in Earl of Norbury v. Kitchin, 7 Law T. (N. S.) 685, it was held that a riparian proprietor, so long as he took no more than his reasonable share of the water, might take water from the stream by pumping machinery, elevate it into a reservoir, and thence convey it by pipes to other land, not riparian, and there use it; the court holding that neither the mode of diversion nor the use to which the water was actually applied was material,—the only question being whether or not the defendant had taken more than his reasonable share.

2. But, appellants claim, as we understand them, that whether the particular mode is material or not, the mode by which the land of a riparian proprietor can possibly be irrigated is a material factor in ascertaining what portion of the water he may divert for irrigation. They contend that a riparian proprietor cannot be allowed to use any portion of the water of the stream to irrigate land which, though bordering on the stream, lies so far above it that water cannot be conducted thereon solely by natural gravitation from the stream, without the use of any appliances other than ditches originally on such land and dams situated thereon, and which will not back the water on the lands of other persons. In other words, the reasonable proportion of water which any riparian proprietor may

withdraw for irrigation is made to depend, primarily, upon the area of his land which can be irrigated in that particular manner. In the first place, that question does not properly arise in this case. The complaint was framed on the theory that the defendants were not riparian proprietors at all, and had no right to divert any water. No issue was tendered as to what amount or proportion of the water of the stream could lawfully be used by the defendants, if they had the right to use any portion. It was denied that they had any rights to the stream and the complaint furnished no data from which any rights of the parties, as tenants in common of the water, could be determined. Nevertheless, as the question seems to have been treated as an issue, evidence being introduced on the subject, apparently without objection, and as the court below did, to a certain extent, consider it, it calls for consideration at our hands. No authorities whatever are cited by appellants in support of this contention, nor can we find that any such doctrine has ever been even suggested by any court or writer. Appellants do cite some cases to the point that riparian diversion must be "on the bank of the proprietor," but the judgments in those cases do not sustain that doctrine, and we are not prepared to say that any such rule exists. It is, however, not necessary to decide that question, for its determination would shed no light on the subject now under consideration. The only question now is whether the mere altitude of this land can deprive the riparian owner of the right to irrigate it. No rules have ever been laid down by this court for determining the relative and proportional rights of riparian proprietors to the use of water for irrigation, nor has any case come before us in which we could properly determine what are the rules on that subject. But, whatever difficulties may arise in matters of detail, that problem must find its solution in an application of the principles upon which the right to use water for that purpose at all is based. That right, as recognized in the decisions of this court, is founded upon the proposition that in an arid country the use of water for irrigation is of such vital consequence that, of necessity, it must be considered as embraced within the spirit of the category of rights accorded by the common law to riparian proprietors. The common-law rule, as interpreted in this country, is that the right to the waters of the stream, with certain

exceptions, not material here, belongs to the riparian proprietors in common and equally, and may be exercised by each as the necessities of the situation may require, only so as not to infringe upon the equal rights of the others. As irrigation is here a necessity of the situation, resulting from climatic conditions, the right to use a just and equal portion of the water for that purpose has been held to be an essential part of the riparian ownership.

Such being the foundation of the right, it is evident that the restriction contended for by appellants is inconsistent with the rule itself. The right to use the water for this purpose results from the need of water upon the land. Assuming this need, in any given case, to exist equally as to all the riparian land, the respective rights of the proprietors to divert water for this purpose must be in proportion to their respective ownerships upon the stream. No other method would conform to the rule of equity. If every riparian proprietor on a given stream owned the same quantity of land, with the same frontage on the stream, and with the same susceptibility to and need of irrigation, each would be entitled to precisely the same quantity of water for that purpose. We do not now decide how far a variation in any one of those factors would affect the question, nor whether all of them are necessarily to be considered in any case. But it must necessarily be true, from the very nature of the right, that in no case can one proprietor be deprived of this just and equal proportion merely because his land, by reason of its altitude or level above the stream, cannot be irrigated by the same method employed on some other land. That the rule contended for by appellants would be utterly inconsistent with the very foundations of the riparian doctrine in this country will readily be seen by observing its results in particular instances. According to appellants' theory, none of the waters of the Colorado river, in the greater part of its course, can ever be used by the riparian owners for irrigation, for none of them can erect a dam high enough to divert any water by gravity on his own land without backing the water upon his neighbor. The same is true of many important streams in the mountainous districts of this state, now extensively used for irrigation. Yet nowhere is irrigation more needed than in such localities. Coming next to the level plains, we find streams with so little fall that

diversion by a dam on the very tract of land to be irrigated is only possible on tracts having very considerable frontage on the stream. Suppose six adjoining proprietors on such a stream, neither of whom can divert the water on his own land in the manner required by appellants. According to appellants' contention, they could not, even by agreement among themselves, divert the water on the land of one, and carry it to the land of another, of their number, or pump it onto the land of any of them. They must permit all the water to flow down to the more fortunate proprietor below, whose acres are thousands to their hundreds. And yet, if one of the six should buy the lands of the others, he would then be entitled to divert the water. Such are some of the consequences, suggesting themselves to the mind, of the rule we are asked to declare, and they show clearly that the mode of diversion of water is a false quantity in the discussion. Whatever be the just proportion of water to which any riparian proprietor is entitled, that proportion cannot be diminished by the fact that, in order to utilize it, he must raise it from the bed of the stream by pumps or other similar appliances. Every diversion of water from a stream is artificial,—a disturbance of the natural order of things. A dam or a ditch is as much an artificial mechanism as a pump,—it may, indeed, be much more so; and the one alters the natural conditions in the same sense that the other does. The right to take the water at all is a right to change the ordinary course of nature; and the methods employed, so long as their use does not infringe the like and equal rights of others, are immaterial. We do not wish to be understood as now deciding how, in any given case, the respective proportions of the different owners upon a stream are to be determined. Whether they are to be ascertained according to the extent of ownership or frontage along the stream, or according to the area of land bordering on the stream, or the amount of land needing or susceptible of irrigation, or the character of the soil, or according to several or all of these circumstances, or other circumstances that may exist, has never been decided, nor has there been, so far as we know, any opportunity for deciding it. We merely hold that the mere mode of diverting the water from the stream, so long as that mode does not deprive others of their equal rights, is not a factor to be considered. * * *

LEADING ILLUSTRATIVE CASES LAW OF MINES AND MINING

CHAPTER III.

MINERAL LANDS AND THOSE WHO MAY ACQUIRE RIGHTS TO THEM.

Various Tests of Mineral Character.

DAVIS v. WIEBBOLD.

139 U. S. 507, 521, 11 Sup. Ct. 628. 1891.

MR. JUSTICE FIELD. * * * In Deffeback v. Hawke, which was before us at October term, 1885, (115 U. S. 392, 6 Sup. Ct. Rep. 95,) we examined at some length the legislation of congress excepting lands containing minerals from sale or other disposition under laws providing for the alienation of portions of the public domain either for settlement or in aid of public institutions or works of internal improvement. It appeared upon such examination that until the act of July 26, 1866, such exception was general, but by that act the policy of reserving mineral lands from sale or grant was changed. Such lands of the public domain, both surveyed and unsurveyed, were thereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who had declared their intention to become citizens, subject to such regulations as might be prescribed by law, and to the local customs and rules of miners in mining districts, so far as they were not in conflict with the laws of the United States. 14 St. c. 262, § 1, p. 251. By the act of May 10, 1872, to promote the development of the mining resources of the United States, (17 St. p. 94, c. 152, § 9,) the first section of the act of 1866, declaring mineral lands of the United States free and open to exploration and occupation, was repealed, and in place of it a provision

was adopted declaring that "all valuable mineral deposits," in lands belonging to the United States, both surveyed and unsurveyed, were free and open to exploration and purchase, subject to conditions similar to those in the original act. The Revised Statutes which embody the law of the United States in force on the 1st of December, 1873, in its treatment of mineral lands, provided that "in all cases lands valuable for minerals" should be reserved from sale, except as otherwise expressly directed by law, (section 2318,) but at the same time repeated the declaration, that all valuable mineral deposits in lands belonging to the United States should be free and open to exploration and purchase. Section 2319. After that date title to mineral lands, known at the time to be valuable, could only be acquired under provisions specially authorizing their sale, except in certain states, which exception does not affect the question now before us. Chapter 8, tit. 32, Rev. St., contains the law for the reservation and sale of town-sites on the public lands. Among other things it provides for the entry, at the local land-office, of any portion of the public lands occupied as a town-site by its corporate authorities, or, if the town be unincorporated, by the judge of the county court of the county in which the town is situated; the entry to be "in trust for the several use and benefit of the occupants thereof, according to their respective interests," and the execution of the trust and the disposal of the lots in the town to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the town is situated. It also provides that the entry shall include only such land as is actually occupied by the town, and the title to which is in the United States; and declares that "where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession, and the necessary use thereof;" with the reservation, however, that nothing in this section shall be so construed as to recognize any color of title in possessors for mining purposes as against the United States. By another section of the chapter, and near its close, it is enacted that "no title shall be acquired" under its provisions "to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws." Section 2392. In

Deffeback v. Hawke, we said of this statement of the legislation of congress that it was plain that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper could be obtained under the pre-emption or homestead laws, or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in certain states, not affecting the question before us; commenting particularly upon the terms "known" and "valuable" used in connection with the minerals in public lands, implying that they must be of that character to bring the lands within the exception of mineral lands from sale or grant by the United States. In that case there was no dispute as to the mineral character of the land claimed by the plaintiff under his mining patent, when the town-site was entered by the probate judge at the local land-office. Proceedings for the acquisition of the mining claim had been previously initiated, the entry of the same had been had, and payment of the price made to the government; and when the patent subsequently issued it took effect by relation at the date of the entry, that being the earliest evidence of any movement for the acquisition of the title of the government. Here the case is different; here the Butte town-site had been entered at the local land-office by the probate judge of the county, and the patent of the United States in due form issued to him in trust for the occupants of the town, before the date of the mining patent, or the entry of the mining claim at the local land-office. And before that time a deed had been made by the probate judge to the defendant of the premises occupied by him, to recover which the present action is brought.

When the entry of the town-site was had, and the patent issued, and the sale was made to the defendant of the lots held by him, it was not known—at least it does not appear that it was known—that there were any valuable mineral lands within the town-site; and the important question is whether, in the absence of this knowledge, the defendant can be deprived, under the laws of the United States, of the premises purchased and occupied by him because of a subsequent discovery of minerals in them, and the issue of a patent to the discoverer. After much consideration, we have come to the conclusion that this question must be answered in the negative. It is true the language of

the Revised Statutes touching the acquisition of title to mineral lands within the limits of town-sites is very broad. The declaration that "no title shall be acquired" under the provisions relating to such town-sites, and the sale of lands therein "to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws," would seem on first impression to constitute a reservation of such mines in the land sold, and of mining claims on them, to the United States; but such is not the necessary meaning of the terms used. In strictness, they import only that the provisions by which the title to the land in such town-sites is transferred shall not be the means of passing a title also to mines of gold, silver, cinnabar, or copper in the land, or to valid mining claims or possessions thereon. They are to be read in connection with the clause protecting existing rights to mineral veins, and with the qualification uniformly accompanying exceptions in acts of congress of mineral lands from grant or sale. Thus read, they must be held, we think merely to prohibit the passage of title under the provisions of the town-site laws to mines of gold, silver, cinnabar, or copper, which are known to exist on the issue of the town-site patent, and to mining claims and mining possessions, in respect to which such proceedings have been taken under the law or the custom of miners, as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried unknown in the depths of the earth. The exceptions of mineral lands from pre-emption and settlement, and from grants to states for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness, and to justify expenditure for its extraction and known to be so at the date of the grant. There are vast tracts of country in the mining states which contain precious metal in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term "mineral" in the sense of this statute is applicable.

On this subject there has been great uniformity of decision by those courts of the states and of the United States which have

had the most frequent occasion to consider the subject, and by the land department. In Alford v. Barnum, 45 Cal. 482, before the supreme court of California in January, 1873, the question arose as to the meaning of the term "mineral lands" in the acts of congress of July 1, 1862, and July 2, 1864, excepting such lands from the grants made by congress to aid in the construction of a railroad and telegraph line across the continent. In the act of 1862 the language is that all mineral land shall be excepted from the operation of the act, 12 St. c. 120, § 3. In the act of 1864, amending the act of 1862, it is declared that the term "mineral land," whenever it occurs in the act, and the act to which that was an amendment, shall not be construed to include coal and iron lands. 13 St. c. 216, § 4. The action in that case was to abate a ditch as a nuisance. The complaint alleged that the plaintiff was the owner of a section of land in California, and that the defendants were digging a ditch across the same, which was to be used for mining purposes. The defendants answered that the land was public mineral land of the United States, and that they were mining thereon for gold. The plaintiff at the time was in possession of the land under a contract of purchase from the railroad company, which had a patent from the United States under the acts of 1862 and 1864, and it was contended that the land was mineral land, excepted both by the acts of congress and by the patent, which contained similar provisions. The plaintiff having recovered in the court below, the case was taken to the supreme court, where the court, in considering the question, said: "The mere fact that portions of the land contained particles of gold, or veins of gold-bearing quartz rock, would not necessarily impress it with the character of mineral land, within the meaning of the acts referred to. It must at least be shown that the land contains metals in quantities sufficient to render it available and valuable for mining purposes. Any narrower construction would operate to reserve from the users of agriculture large tracts of land which are practically useless for any other purpose, and we cannot think this was the intention of congress." In Merrill v. Dixon, 15 Nev. 401, the supreme court of Nevada held that, in excluding mineral lands from the grant to the Pacific Railroad Company, congress only intended to reserve lands valuable for mining purposes; citing the California case. In Cowell v. Lammers, 10

Sawy. 246, 257, 21 Fed. Rep. 200, the question came before the circuit court of the United States for the district of California, as to the meaning of "mineral lands" in the grant to the Pacific Railroad Company. That company having completed its road in accordance with the provisions of those acts, a patent was issued to it, the granting clause of which excepted and excluded all mineral lands, should any be found to exist in the tracts described. Judge Sawyer, in deciding the case, said: "The land department in this very case, as in cases of patents to pre-emptioners, homestead claimants, and other purchasers of the public lands, have acted, and, I think, correctly, upon the idea that patents to lands, not known to be mineral lands at the time the patent issued, carry the title to all mines subsequently discovered in the lands, notwithstanding the reservation from sale of mineral lands in the acts of congress. By the words 'mineral lands' must be understood lands known to be such, or which there is satisfactory reason to believe are such, at the time of the grant or patent. And the United States courts, which have had occasion to act upon this subject, so far as I am aware, have adopted that idea. Milling Co. v. Spargo, 8 Sawy. 645, 16 Fed. Rep. 348. There must be some point of time when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent. The supreme court has not yet had occasion to decide the point as to the effect on a patent of a discovery of a valuable mine in lands subsequently to the issue of a patent. Any other construction would be disastrous in the extreme to the holders of lands in California under United States patents. If land which a party has actually occupied, possessed, and peaceably enjoyed for a long series of years, claiming title under a patent of the United States 15 years old, can be entered upon and prospected for a mine by any trespasser who chooses to do so, and, a mine being found, the mine can be located, and taken out of the patent on the vague and uncertain exception in the patent in question, it can be done fifty or a hundred years hence, and the patent, instead of being a muniment of title upon which the patentee or his grantees can rest in security, would be but a delusion and a snare." * * * In Dughi v. Harkins, 2 Dec. Dep. Int. 721, which was before the interior department

in November, 1883, there was a contest between mineral and agricultural claimants, the land having been returned as agricultural by the surveyor general. In disposing of it the secretary, Mr. Teller, in a communication to the commissioner of the general land-office, said: "The burden of proof is therefore upon the mineral claimant, and he must show, not that neighboring or adjoining lands are mineral in character, or that that in dispute may hereafter by possibility develop minerals in such quantity as will establish its mineral rather than its agricultural character, but that, as a present fact, it is mineral in character; and this must appear from actual production of mineral, and not from any theory that it may produce it; in other words, it is fact, and not theory, which must control your office in deciding upon the character of this class of lands. Nor is it sufficient that the mineral claimant shows that the land is of little agricultural value. He must show affirmatively, in order to establish his claim, that the mineral value of the land is greater than its agricultural value." In the case of Spong, 5 Dec. Dep. Int. 193, which was before the department of the interior in October, 1886, similar views were expressed. * * * See to this purport the following decisions of the interior department: Mining Co. v. Ferguson, 6 Dec. Dep. Int. 218; Nicholas Abercrombie, 6 Dec. Dep. Int. 393; John Downs, 7 Dec. Dep. Int. 71; Cutting v. Reininghaus, Id. 265; Mining Co. v. Johnson, 8 Dec. Dep. Int. 440; Thomas J. Laney, 9 Dec. Dep. Int. 83.

It would seem from this uniform construction of that department of the government specially intrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining states, federal and state, whose attention has been called to the subject, that the exception of mineral lands from grants in the acts of congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their extraction. The grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated. There has been no direct adjudication upon this point by this court, but this conclusion is a legitimate inference from several of its decisions. It was implied in the opinion in Deffe-

back v. Hawke, already referred to, and in the cases of Iron Co. v. U. S., 123 U. S. 307, 328, 8 Sup. Ct. Rep. 131, and U. S. v. Mining Co., 128 U. S. 673, 683, 9 Sup. Ct. Rep. 195. In Iron Co. v. U. S., a bill was filed to set aside patents issued for agricultural lands, on the ground that it was known at the time of their issue that the lands contained mines of coal. But the court said: "To constitute the exemption contemplated by the pre-emption act, under the head of 'Known Mines,' there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes. The circumstance that there are surface indications of the existence of veins of coal does not constitute a mine. It does not even prove that the land will ever be under any conditions sufficiently valuable on account of its coal deposits to be worked as a mine. A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual 'known mines,' capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the pre-emption act cannot be successfully assailed." In U. S. v. Mining Co., a bill was filed to set aside certain patents on the ground that they were issued upon false representations that the land patented embraced only placer mining claims, and not any mineral veins or lodes; and the court said with reference to the uncertain proof on the subject: "It is not enough that there may have been some indications by outcroppings on the surface of the existence of lodes or veins of rock in place, bearing gold or silver, or other metal, to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation."

In connection with these views it is to be borne in mind, also, that the object of the town-site act was to afford relief to the inhabitants of cities and towns upon the public lands, by giving

title to the lands occupied by them, and thus induce them to erect suitable buildings for residence and business. Under such protection many towns have grown upon lands which, previously to the patent, were part of the public domain of the United States, with buildings of great value for residence, trade, and manufactures. It would in many instances be a great impediment to the progress of such towns if the titles to the lots occupied by their inhabitants were subject to be overthrown by a subsequent discovery of mineral deposits under their surface. If their title would not protect them against a discovery of mines in them, neither would it protect them against the invasion of their property for the purpose of exploring for mines. The temptation to such exploration would be according to the suspected extent of the minerals, and, being thus subject to indiscriminate invasion, the land would be to one having the title poor and valueless, just in proportion to the supposed richness and abundance of its products. We do not think that any such results were contemplated by the act of congress, or that any construction should be given to the provision in question which could lead to such results. Our conclusion, as already substantially stated, is that congress only intended to preserve existing rights to known mines of gold, silver, cinnabar, or copper, and to known mining claims and possessions, against any assertion of title to them by virtue of the conveyance received under the town-site act, and not to leave the titles of purchasers in the town-sites to be disturbed by future discoveries. In Deffeback v. Hawke, the mining patentee's rights antedated those of the occupants under the town-site law, and wherever such is the case his rights will be enforced against the pretensions of the town-site holder; but where the latter has acquired his rights in advance of the discovery of any mines, and the initiation of proceedings for the acquisition of their title or possession, his rights will be deemed superior to those of the mining claimant.

It is not necessary in this case to state in what manner it must be shown that the existence of mines was known at the time the patent for the town-site was issued. If the mining patent states any initiatory steps in acquiring title which antedate the title of the town-site, that may suffice in an action at law. In the absence of such statement, the development and working of a mine would be a controlling fact; so, also, perhaps, would be

the location of the claim patented, and notice thereof required by law, or the custom of miners. But in this case the patent does not show any such initiatory steps; it merely refers to the entry of the mining claim, and that was after the patent was issued to the town-site. No proof was offered to show when the mining claim was originally located; and it does not appear that the want of it was made an objection to the plaintiff's recovery, except as that may be implied from the defendant's offer to prove that at the time the patent to the Butte town-site was issued to the probate judge the premises embraced by the Gold Hill lode were not known to be valuable for minerals of any kind. That proof was excluded on the ground that the mining patent to the plaintiff established that the premises contained valuable minerals. Such was the effect of the patent, if there were any jurisdiction in the land department to issue a mining patent at all under the circumstances of this case. Assuming for the present that there was jurisdiction, the question was not whether there were valuable minerals at the time that patent was issued, but whether such minerals were known to exist within the premises at the date of the town-site patent to the probate judge. The plaintiff not having offered any proof upon this point, but having relied upon the fact as a matter of presumption merely, the defendant should have been permitted to establish the negative of it. The absence of any proceedings required by law or the custom of the mining district to initiate a right to a mining claim, which he might perhaps have shown, would have been very persuasive that no mine was then known to exist. We think the court erred in excluding the proof of the defendant.

When the patent to the mining company was offered in evidence an objection was taken on the ground that the exception contained in it excluded all town lots from the grant, and it was necessary for the plaintiff to show that the property in controversy did not consist of lots thus excepted. The exception in the patent went only to the exclusion of the lots from interfering with the surface of the land granted with the mining lode. But we do not attach any importance to the exception, for the officers of the land department, being merely agents of the government, have no authority to insert in a patent any other terms than those of conveyance, with recitals showing

which no patent had been issued, and of mines in public lands, for immediately after using these expressions we said: "Whenever, therefore, mines are found in lands belonging to the United States, whether within or without town-sites, they may be claimed and worked, provided existing rights of others, from prior occupation, are not interfered with." It must be borne in mind, also, that town-sites on the public domain, in many instances, and probably in the greater part of them, embrace a much larger tract of country than is included in a patent for such town-sites. The United States laws limit the quantity that shall be included within the patent of such a town-site to the number of its inhabitants. Where there are over 100 and less than 200 inhabitants, the patent can only embrace lands not exceeding 320 acres; where the inhabitants number more than 200 and less than 1,000, it cannot embrace more than 640 acres; and where the inhabitants are 1,000 or more, it cannot exceed 1,280 acres. For each additional thousand inhabitants, not exceeding 5,000, a further grant of only 320 acres is allowed. Valuable mineral deposits in such lands outside of the patent are equally open to exploration and purchase as those in lands outside of the town-site. It was in reference to mines in unoccupied public lands in unpatented town-sites that the language in Steel v. Smelting Co. was used, and to them and to mines in public lands in patented town-sites outside of the limits of the patent it is only applicable. We agree to all that is urged by counsel as to the conclusiveness of the patents of the land department when assailed collaterally in actions at law. We have had occasion to assert their unassailability in such cases in the strongest terms, both in Smelting Co. v. Kemp, 104 U. S. 636, 640–646, and in Steel v. Smelting Co., 106 U. S. 447, 451, 452, 1 Sup. Ct. Rep. 389. They are conclusive in such actions of all matters of fact necessary to their issue, where the department had jurisdiction to act upon such matters, and to determine them; but if the lands patented were not at the time public property, having been previously disposed of, or no provision had been made for their sale or other disposition, or they had been reserved from sale, the department had no jurisdiction to transfer the land, and their attempted conveyance by patent is inoperative and void, no matter with what seeming regularity the forms of law have been observed. In the

several cases to which we have been referred in the fifth and sixth Montana Reports, (Milling Co. v. Clark, 5 Mont. 378, 5 Pac. Rep. 570; Talbott v. King, 6 Mont. 76, 9 Pac. Rep. 434; Butte City Smoke-House Lode Cases, 6 Mont. 397, 12 Pac. Rep. 858,) which involved contests between parties claiming under mining patents and others claiming under town-site patents, and in which very able and learned opinions were given by the supreme court of the territory of Montana, the mining claim patented had been located and the rights of the mining claimant had thus attached before the town-site patent was issued. The patent which subsequently followed was a mere perfection of the right originated by the location, and to which it took effect by relation. It was held, in accordance with this opinion, that the prior mining location was not affected by the town-site entry. It follows from the views expressed that the judgment of the supreme court of the territory of Montana must be reversed, and the cause remanded to the supreme court of the state, with directions to order a new trial in the proper trial court; and it is so ordered.

CHRISMAN v. MILLER.

197 U. S. 313, 25 Sup. Ct. 468. 1905.

Statement by MR. JUSTICE BREWER.

* * * * * * * * * * * *

It is true that, when the controversy is between two mineral claimants, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority. That, it is true, is the case before us. But even in such a case, as shown by the authorities we have cited, there must be such a discovery of mineral as gives reasonable evidence of the fact, either that there is a vein or lode carrying the precious mineral, or, if it be claimed as placer ground, that it is valuable for such mining. * * *

CHAPTER IV.

VEINS OR LODES AND THEIR LOCATION.

Discovery.

LAWSON v. UNITED STATES MINING CO.

207 U. S. 1, 28 Sup. Ct. 15. 1907.

MR. JUSTICE BREWER. * * * It is not open to dispute that the defendants were taking ore from beneath the surface of the plaintiff's four claims. The question therefore arises, What right had they to thus mine and remove ore? They must show that the ore was taken from a vein belonging to them. Was there a vein? Where was its apex, and who was the owner of that apex? The testimony is voluminous, and even with the accompanying diagrams it is difficult to come to a satisfactory conclusion as to the facts.

* * * * * * * * * * *

From the opinion of the court of appeals it appears that it found that there was a broad vein. It says: "A careful examination and consideration of the evidence clearly convinces us that the stratum of limestone constitutes a single broad vein or lode of mineral-bearing rock extending from the quartzite on one side to the quartzite on the other." This stratum of limestone underlies the four claims of the plaintiff, and one of the contentions of the defendants is that there are several independent veins, one of which has its apex within the surface lines of the Kempton and another its apex in the Ashland, that these independent veins continue down through the stratum of limestone beneath the surface of the plaintiff's claims, and that it was only from these independent veins that the defendants were mining and removing ore. Of course, this difference between the conclusions of the court and the contentions of the defendants affects materially the scope of the inquiry. If the limestone is not, strictly speaking, a vein, but a mere stratum of rock through which run several independent veins, then the inquiry

must extend to the location of the apex of each separate vein; whereas, if the stratum of limestone in itself is a single broad vein, then the inquiry is narrowed to the location of its apex.

With reference to the conclusion of the court of appeals it is sufficient to say that if the testimony does not show that it is correct, it fails to show that it is wrong, and under those circumstances we are not justified in disturbing that conclusion. It is our duty to accept a finding of fact, unless clearly and manifestly wrong.

Treating this limestone as a single broad vein, it is apparent that the entire apex is not within the surface of either the Kempton and Ashland, but that it is also found in the Old Jordan and Mountain Gem,—the properties of the plaintiff. The line which divides the surface of the claims of the defendants from the Old Jordan and Mountain Gem claims also bisects the vein as it comes to the surface. In other words, part of the apex is within plaintiff's claims and part within defendants'. In such a case the senior location takes the entire width of the vein on its dip. This was the conclusion of the court of appeals, as shown by this quotation from its opinion (p. 592):

"Where two or more mining claims longitudinally bisect or divide the apex of a vein, the senior claim takes the entire width of the vein on its dip, if it is in other respects so located as to give a right to pursue the vein downward outside of the side lines.

This is so because it has been the custom among miners, since before the enactment of the mining laws, to regard and treat the vein as a unit and indivisible, in point of width, as respects the right to pursue it extralaterally beneath the surface; because usually the width of the vein is so irregular, and its strike and dip depart so far from right lines, that it is altogether impracticable, if not impossible, to continue the longitudinal bisection at the apex throughout the vein on its dip or downward course; and because it conforms to the principle pervading the mining laws, that priority of discovery and of location gives the better right, as is illustrated in the provision giving to the senior claim all ore contained in the space of intersection where two or more veins intersect or cross each other, and in the further provision giving to the senior claim the entire vein at and below the point of union, where two or more veins with distinct apices and em-

braced in separate claims unite in their course downward. Rev. Stat. § 2336, U. S. Comp. Stat. 1901, p. 1436."

We fully indorse the views thus expressed. Discovery is the all-important fact upon which title to mines depends. Lindley, in his work on Mines, 2d ed. vol. 1, § 335, says:

"Discovery in all ages and all countries has been regarded as conferring rights or claims to reward. Gamboa, who represented the general thought of his age on this subject, was of the opinion that the discoverer of mines was even more worthy of reward than the inventor of a useful art. Hence, in the mining laws of all civilized countries, the great consideration for granting mines to individuals is *discovery*. 'Rewards so bestowed,' says Gamboa, 'besides being a proper return for the labor and anxiety of the discoverers, have the further effect of stimulating others to search for veins and mines, on which the general prosperity of the state depends.'"

The two thoughts here presented are reward for the time and labor spent in making the discovery, thus adding to the general wealth, and incentive to others to prosecute searches for veins and mines. To take from the discoverer a portion of that which he has discovered and give it to one who may have been led to make an adjoining location by a knowledge of the discovery, and without any previous searching for mineral, is manifest injustice.

Again, as indicated in the quotation from the court of appeals, continuing the line of division shown upon the surface through the descending vein would be attended with great difficulty and uncertainty. Dealing with questions of this nature, a practical view must be taken. Veins do not continue of uniform width in their descent, but are often irregular and broken, and to attempt to make a division of ore according as it appears on the surface, or equally, would require the constant supervision of a court. It is not strange, then, that the custom of miners has been, as stated by the court of appeals, to regard and treat the vein as a unit and indivisible in point of width, and belonging to the discoverer. This question has been before this court, as well as several of the courts in the mining districts. In Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 478, 484, 30 L. ed. 1140, 1142, 7 Sup. Ct. Rep. 1356, we said:

"Assuming that on the same vein there were surface outcrop-

pings within the boundaries of both claims, the one first located necessarily carried the right to work the vein."

In Bullion, B. & C. Min. Co. v. Eureka Hill Min. Co. 5 Utah, 3, 11 Pac. 515, the question is discussed at some length by Chief Justice Zane. In the course of the opinion it is said (p. 54):

"Under the law of 1866 the surface ground was merely for the convenient working of the lode. The discoverer and first locator took the lode in its entirety. The law contemplated its segregation in its length, not in its width. It refers to lodes between the end lines, not to a part of a lode. No expression can be found in it indicating an intention to limit the rights of the locator to a portion of the lode in its width. The discovery of any part of the apex of a vein is regarded by it as a discovery of the entire apex. And we think that the law of 1872, when all of its provisions are considered together, and in connection with the former law on the subject, as it should be, evinces the same intent. Under this law the discoverer of any part of the apex gets the right to its entire width, despite the fact that a portion of the width may be outside of the surface side lines of his claim extended downwards vertically. While he has no right to the extralateral surface, he has a right to the extralateral lode beneath the surface."

See also St. Louis Min. & Mill. Co. v. Montana Min. Co. (C. C. App. 9th C.) 56 L. R. A. 725, 44 C. C. A. 120, 104 Fed. 664; Empire State-Idaho Min. & Developing Co. v. Bunker Hill & S. Min. & Concentrating Co. (C. C. App. 9th C.) 52 C. C. A. 219, 114 Fed. 417. Also another suit between the same parties in the same court, 66 C. C. A. 99, 131 Fed. 591; Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co. (C. C. App. 9th C.) 66 C. C. A. 299, 131 Fed. 579.

But it is contended by the defendants that both the entries and patents of the Ashland and Kempton claims were prior in time to the entries and patents of the Old Jordan and Mountain Gem, and that such priority of entry and patent conclusively establishes the prior right of the owners to this broad vein; that the failure of the owners of the Old Jordan and Mountain Gem to adverse the applications of the owners of the Ashland and Kempton for patent was an admission that the latter had priority of right, and is conclusive against any present testimony as to the dates of the locations. We had occasion in the recent

case of Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co., 196 U. S. 337, 49 L. ed. 501, 25 Sup. Ct. Rep. 266, to consider to what extent the issue of a mining patent worked an estoppel of the claims of third parties and it is unnecessary now to repeat the discussion there had.

This case presents the question under different aspects. The entries and patents of the Ashland and Kempton claims were, as stated, prior in time to the entries and patents of the Old Jordan and Mountain Gem. There is no record of any adverse suits, although it is intimated that there were such suits. In the absence of a record thereof we cannot assume that anything more was presented and decided than was necessary to justify the patents.

A patent is issued for the land described, and all that is necessarily determined in an adverse suit is the priority of right to the land. This is evident from § 2325, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1429), which says: "A patent for any land claimed and located for valuable deposits may be obtained in the following manner." In the section the only matters mentioned for examination and consideration relate to the surface of the ground. There is no suggestion or provision for any inquiry or determination of subterranean rights. Lindley, in his work on Mines, 2d ed. vol. 2, § 730, says:

"An application for patent invites only such contests as affect the surface area. A possible union of veins underneath the surface cannot be foreshadowed at the time the application is made. When such a condition arises, it is adjusted by reference to surface apex ownership and priority of location not involving any surface conflict. The rule is well settled that conflicting adverse rights set up to defeat an application for patent cannot be recognized in the absence of an alleged surface conflict. Prospective underground conflicts . . . are not the subject of adverse claims."

In New York Hill Co. v. Rocky Bar Co., 6 Land Dec. 318, the Commissioner of the General Land Office declined to recognize an adverse claim where there was no surface conflict, saying (p. 320):

"In the event that patent should be issued upon said application and any question should thereafter arise as to the right, under such patent, to follow any vein or lode, as indicated in

said § 2322 (U. S. Comp. Stat. 1901, p. 1425), it would be a matter for the courts to settle, and I am of the opinion, there being no surface conflict alleged in this case, and without considering any other question relating to the sufficiency of the so-called adverse claim, that you properly declined to receive the same as an adverse claim, and to that extent your decision is affirmed."

The same ruling was made in Smuggler Min. Co. v. Trueworthy Lode Claim, 19 Land Dec. 356.

Without determining what would be the effect of a judgment in an adverse suit in respect to subterranean rights, if any were in fact presented and adjudicated, it is enough now to hold that there is no presumption, in the absence of the record, that any such rights were considered and determined. Indeed, in the absence of a record, or some satisfactory evidence, it is to be assumed that the patents were issued without any contest and upon the surveys made under the direction of the United States surveyor general, and included only ground in respect to which there was no conflict. If the surface ground included in an application does not conflict with that of an adjoining claimant, the latter is in no position to question the right of the former to a patent.

Take the not infrequent case of two claims adjoining each other, the boundary line between which is undisputed. If the owner of one applies for a patent the owner of the other is clearly under no obligation to adverse that application, even if, under any circumstances, he might have a right to do so. Other necessary conditions being proved, the applicant is entitled to a patent for the ground. Generally speaking, if the boundary between the two claims is undisputed the foundation for an adverse suit is lacking. While a patent is evidence of the patentee's priority of right to the ground described, it is not evidence that that right was initiated prior to the right of the patentee of adjoining tract to the ground within his claim.

Section 2336, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1436), makes provision for conflict as to certain subterranean rights. The last sentence of the section reads: "And, where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection." Argentine Min. Co. v. Terrible Min. Co. supra. As the place of

inquiry and decision after patent, and then it can only be in the courts. And the same rule will obtain as to other subterranean rights.

It is further contended that there is no evidence of a valid location of the "Old Jordan" and Mountain Gem prior to the entries of the Ashland and Kempton.

* * * * * * * * * * * *

It is sufficient to say that by stipulation of counsel it was agreed that the patents to the "Old Jordan" and Mountain Gem were issued upon the location notices. Inasmuch as they were accepted by the government, and patents issued thereon, it was a recognition by the Department of the conformity of the proceedings to the local rules and customs of the district, and such ruling is not open to challenge by third parties claiming rights arising subsequently to such notices.

Summing up our conclusions, the findings of fact as stated in the opinion of the court of appeals are not clearly against the testimony, and must, therefore, be sustained. According to those findings there was a single broad vein,—the apex or outcroppings of which extended through the limits of some of the plaintiff's and defendants' claims,—and not several independent veins. The ore which was being mined and removed by the defendants was taken from this single broad vein beneath the surface ground of claims belonging to the plaintiff. Where there is a single broad vein whose apex or outcroppings extend into two adjoining mining claims the discoverer has an extralateral right to the entire vein on its dip. Acceptance by the government of location proceedings had before the statute of 1866, and issue of a patent thereon, is evidence that those location proceedings were in accordance with the rules and customs of the local mining district. The priority of right to a single broad vein vested in the discoverer is not determined by the dates of the entries or patents of the respective claims, and priority of discovery may be shown by testimony other than the entries and patents. In the absence from the record of an adverse suit there is no presumption that anything was considered or determined except the question of the right to the surface.

From these conclusions it is obvious that the decision of the Circuit Court of Appeals was right, and it is affirmed.

Rights of Locators.

FARRELL v. LOCKHART.

210 U. S. 142, 28 Sup. Ct. 681. 1908.

MR. JUSTICE WHITE. In the month of February, 1905, James Farrell, plaintiff in error, as owner of the Cliff lode mining claim, situated in the Uintah mining district, Summit county, Utah, made application in the United States land office at Salt Lake City for a patent, and published the notice required by law. The defendant in error, as the administrator of the estate of John G. Rhodin, filed an adverse claim based upon the location by Rhodin of the ground as the Divide lode mining claim. Thereafter, pursuant to Rev. Stat. § 2326, U. S. Comp. Stat. 1901, p. 1430, this action was brought in a court of the state of Utah by the administrator of Rhodin, in support of said adverse claim.

In the complaint filed by the administrator the right of Rhodin to the Divide was asserted to have been initiated by a location duly made on January 2, 1903. Farrell in his answer asserted a paramount right by reason of his ownership of the Cliff claim, averring that it had been initiated by a location made on August 1, 1901, seventeen months prior to the location of the Divide by Rhodin. To the affirmative matter pleaded in the answer of Farrell a general denial was interposed, and it was also averred as follows: Plaintiff "alleges that at the time and date of the attempted location of the said Cliff patented mining claim the ground therein contained was not any part of the open and unclaimed mineral land of the United States, but, on the contrary, the whole thereof, including the point and place of discovery of said alleged Cliff mining claim, was then embraced and included and contained in a valid and subsisting mining claim, called the South Mountain, then and there the property and in the possession of the predecessors of this plaintiff's intestate; and for the reason that the discovery of said alleged Cliff mining claim was not placed upon unoccupied and unclaimed land of the United States, the alleged location based thereon became absolutely void."

The case was tried by the court, and it was specifically found that the Cliff, the Divide, and the South Mountain claims, as

located, covered substantially the same ground, and that the place of discovery of the Cliff was within the boundaries of the alleged South Mountain mining claim. It was further specifically found by the court that, upon the trial of the action, "plaintiff offered evidence (subject to the objection of the defendant that the same was incompetent, immaterial, and irrelevant, and that no adverse claim was filed on behalf of the South Mountain lode mining claim) tending to show that, during the month of August, 1900, the ground in controversy herein was located by W. I. Snyder and Thomas Roscamp, respectively, citizens of the United States, under the name of the South Mountain lode mining claim. That a discovery of a vein was made and notice of location posted, and the boundaries of said claim marked so that the same could readily be traced, and that said notice was in due form, and was duly recorded in the office of the county recorder of Summit county, state of Utah. That no work was ever done upon said South Mountain claim, and that said South Mountain claim lapsed and became forfeited for want of work done thereon, on December 31, 1901. That no adverse claim was filed on behalf of said South Mountain lode against the application for patent for said Cliff lode mining claim. That on or about the 13th day of October, 1902, said Snyder and Roscamp made a deed purporting to convey said alleged South Mountain lode mining claim to said John G. Rhodin."

When it decided the case, the court found that Farrell initiated his ownership of the Cliff claim on August 1, 1901, and performed all the acts required by law in addition to the annual labor required by statute, and that Rhodin initiated on January 2, 1903, his Divide claim. The court decided in favor of the defendant Farrell, and entered a decree adjudging that he was the owner, in possession of the premises in controversy, and entitled to the possession, except as against the paramount title of the United States. The court treated the proof offered on behalf of the plaintiff as to the location of the South Mountain claim for the same ground embraced in the Cliff, made a year prior to the location of the latter claim, as immaterial and irrelevant. Plaintiff duly excepted and appealed to the supreme court of the state. The court, in disposing of the appeal, considered solely what it termed the "decisive question" presented by the record, viz., "whether the appellant, as owner of the Divide claim, who,

as such, adversed the application for patent, is in position to show and assert that at the time of the location of the Cliff claim, the ground located was covered by the South Mountain, a then valid and subsisting claim; that the discovery point of the Cliff was within the boundaries of the South Mountain; and that, therefore, the locator of the Cliff did not discover a vein or lode on, or make a valid location of, unappropriated and unoccupied mineral lands of the United States, and because thereof his location is and was void, not only against the locators of the South Mountain, but all the world." In deciding this question the court deemed that it was called upon to consider and apply the ruling in Lavagnino v. Uhlig, 198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716. Doing so it was recognized that the reasoning in the opinion in that case was broad enough to maintain where, on an adverse claim, the first or senior locator did not appear to oppose the application for a patent made by a second locator, whose rights in the same ground had been initiated prior to the forfeiture of the senior location, for failure to perform the annual labor required by the statute, a third locator could not be heard to complain that the second locator had initiated his claim upon mining ground which was not at the time open to location. While thus conceding, the court considered that the reasoning in question ought to be restricted, because not to do so would cause Lavagnino v. Uhlig to be in conflict with cases decided prior to the decision in that case, and, moreover, would establish a rule in conflict with the practice which had long prevailed in the mining dictricts, and would therefore create great confusion and uncertainty in respect to mining claims, and unsettle rights of property of great value. The court did not at all doubt that Lavagnino v. Uhlig had been correctly decided in view of the issues in that case; but, for the reasons which we have just stated, it held that the ruling in Lavagnino v. Uhlig must be considered as narrowed, so as to apply only to a case where the second location did not embrace the discovery point of the first, but was a mere overlap. Thus applying the ruling in Lavagnino v. Uhlig, the court held that, as the location by Farrell of the Cliff claim was made upon substantially the same ground embraced by the South Mountain and the statutory period for the forfeiture of the South Mountain claim had not expired, the Cliff claim was not located on ground subject to location, and

was void; that, as the Divide had been located or relocated after the lapsing of the South Mountain claim, the Divide claim was located on land subject to be appropriated, and was therefore paramount to the second or Farrell location. The judgment of the trial court was therefore reversed and a decree was made in favor of the administrator of Rhodin. 31 Utah 155, 86 Pac. 1077. Farrell thereupon sued out this writ of error.

In the argument at bar our attention has been directed to several decisions of the highest courts in some of the mining states or in territories of the United States where mining prevails,—Nash v. McNamara (Nev.) 93 Pac. 405, and cases cited,—which, in considering the reasoning of Lavagnino v. Uhlig, also attributed to that reasoning, broadly construed, the serious and unfavorable consequences on rights of property suggested by the court below in its opinion. It may not be doubted, unless the reasoning in the Lavagnino case is to be restricted or qualified, that the grounds upon which the court below rested its conclusions were erroneous. Not doubting at all the correctness of the decision in the Lavagnino case, especially in view of the issue as to long possession and the operation of the bar of the statute of the state of Utah, which was applied by the court below in that case, and whose judgment was affirmed, we do not pause to particularly re-examine the reasoning expressed in the opinion in Lavagnino v. Uhlig as an original proposition. We say this, because, whatever may be the inherent cogency of that reasoning, in view of the experience of the courts referred to concerning the practice which it was declared had prevailed, in reliance upon what was deemed to be the result of previous decisions of this court, and the effect on vested rights which it was said would arise from a change of such practice, and taking into view the prior decisions referred to, especially Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735, as also the more recent case of Brown v. Gurney, 201 U. S. 184, 50 L. ed. 717, 26 Sup. Ct. Rep. 509, we think the opinion in the Lavagnino case should be qualified so as not to exclude the right of a subsequent locator on an adverse claim to test the lawfulness of a prior location of the same mining ground upon the contention that, at the time such prior location was made, the ground embraced therein was covered by a valid and subsisting mining claim. It is to be observed that this qualification but permits a third locator to offer proof tending

to establish the existence of a valid and subsisting location anterior to that of the location which is being adversed. It does not, therefore, include the conception that the mere fact that a senior location had been made, and that the statutory period for performing the annual labor had not expired when the second location was made, would conclusively establish that the location was a valid and subsisting location, preventing the initiation of rights in the ground by another claimant, if, at the time of such second location, there had been an actual abandonment of the original senior location. We say this because—taking into view Belk v. Meagher, Lavagnino v. Uhlig, and Brown v. Gurney —we are of the opinion, and so hold, that ground embraced in a mining location may become a part of the public domain so as to be subject to another location before the expiration of the statutory period for performing annual labor, if, at the time when the second location was made, there had been an actual abandonment of the claim by the first locator.

In Black v. Elkhorn Min. Co. 163 U. S. 445, 41 L. ed. 221, 16 Sup. Ct. Rep. 1101, summing up as to the character of the right which is granted by the United States to a mining locator, after observing that no written instrument is necessary to create the right, and that it may be forfeited by the failure of the locator to do the necessary amount of work, it was said (p. 450):

"(3) His interest in the claim may also be forfeited by his abandonment, with an intention to renounce his right of possession. It cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had.

"An easement in real estate may be abandoned without any writing to that effect, and by any act evincing an intention to give up and renounce the same. Snell v. Levitt, 110 N. Y. 595, 1 L. R. A. 414, 18 N. E. 370, and cases cited at p. 603 of opinion of Earl, J.; White v. Manhattan R. Co. 139 N. Y. 19, 34 N. E. 887. If the locator remained in possession and failed to do the work provided for by statute, his interest would terminate, and it appears to be equally plain that, if he actually abandoned the possession, giving up all claim to it, and left the land, that all the right provided by the statute would terminate under such circumstances."

It remains only to test the correctness of the conclusions of the court below in the light of the principles just announced. Now, it was found by the trial court that the evidence offered tended to show that the South Mountain lode claim was located in August, 1900, *and that no work was ever done on said claim,* and that it became forfeited for want of the annual labor required by the statute on December 31, 1901. Farrell made his location in August, 1901, a year after the South Mountain was located and five months before the expiration of the period when a statutory forfeiture of the South Mountain would have resulted. The offer of proof, therefore, made by the administrator of Rhodin, to show that the South Mountain was a valid and subsisting location when Farrell made the location of the Cliff, tended to show that during the year that had intervened between the location of the South Mountain and the location by Farrell of the Cliff, no work of any character whatever was done by the locators of the South Mountain, and that this was also true from the time the Cliff was located to the expiration of the period when a statutory forfeiture would have been occasioned. As all rights of the locators of the South Mountain were, in any aspect, at an end by their failure to adverse, and as the Cliff was prior in time to the Divide, and therefore the burden of proof was on the Divide to establish that the Cliff location was not a valid one, we think that the burden would not have been sustained by the proof offered. To the contrary, we are of opinion that the proof which was so offered on behalf of the Divide tended, when unexplained, to show that the location of the South Mountain was not made in good faith, and that the claim had actually been abandoned when Farrell made his location. The supreme court of Utah should therefore have remanded the cause, so that it might be determined whether or not the South Mountain had been abandoned by the locators of that claim when Farrell made his location; and error was therefore committed in entering judgment in favor of Lockhart, the administrator of Rhodin, decreeing to him possession of the ground in controversy.

The judgment of the Supreme Court of Utah must therefore be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

CHAPTER V.

THE EXTRALATERAL RIGHT.

Vein Crossing an End Line and a Side Line.

DEL MONTE MINING & MILLING CO. v. LAST CHANCE MINING & MILLING CO.

171 U. S. 55, 18 Sup. Ct. 895. 1898.

Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

The appellant is the owner in fee of the Del Monte lode mining claim located in the Sunnyside mining district, Mineral county, Colo., for which it holds a patent bearing date February 3, 1894, pursuant to an entry made at the local land office on February 27, 1893. The appellee is the owner of the Last Chance lode mining claim, under patent dated July 5, 1894, based on an entry of March 1, 1894. The New York lode mining claim, which is not owned by either of the parties, was patented on April 5, 1894, upon an entry of August 26, 1893. The relative situation of these claims, as well as the course and dip of the vein, which is the subject of controversy, is shown on * * * diagram, p. 826.

Both in location and patent the Del Monte claim is first in time, the New York second, and the Last Chance third. When the owners of the Last Chance claim applied for their patent, proceedings in adverse were instituted against them by the owners of the New York claim, and an action in support of such adverse was brought in the United States circuit court for the district of Colorado. This action terminated in favor of the owners of the New York and against the owners of the Last Chance, and awarded the territory in conflict between the two locations to the New York claim. The ground in conflict between the New York and Del Monte, except so much thereof as was also in conflict between the Del Monte and Last Chance locations, is included in the patent to the Del Monte claim. The

New York secured a patent to all of its territory except that in conflict with the Del Monte, and the Last Chance in turn secured a patent to all of its territory except that in conflict with the New York, in which last-named patent was included the triangular surface conflict between the Del Monte and Last Chance, which, by agreement, was patented to the latter. The Last Chance claim was located upon a vein, lode or ledge of silver and lead bearing ore, which crosses its north end line, and continues southerly from that point through the Last Chance location until it reaches the eastern side line of the New York, into which latter territory it enters, continuing thence southerly with a southeasterly course on the New York claim until it crosses its south end line. No part of the apex of the vein is embraced within the small triangular parcel of ground in the southwest corner of the Last Chance location which was patented to the Last Chance as aforesaid, and no part of the apex is within the surface boundaries of the Del Monte mining claim. The portion of the vein in controversy is that lying under the surface of the Del Monte claim, and between two vertical planes; one drawn through the north end of the Last Chance claim extending westerly, and the other parallel thereto, and starting at the point where the vein leaves the Last Chance and enters the New York claim, as shown on the foregoing diagram. Upon these facts the following questions have been certified to us:

"(1) May any of the lines of a junior lode location be laid within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location?

"(2) Does the patent of the Last Chance lode mining claim, which first describes the rectangular claim by metes and bounds, and then excepts and excludes therefrom the premises previously granted to the New York lode mining claim, convey to the patentee anything more than he would take by a grant specifically describing only the two irregular tracts which constitute the granted surface of the Last Chance claim?

"(3) Is the easterly side of the New York lode mining claim an 'end line' of the Last Chance lode mining claim, within the meaning of sections 2320 and 2322 of the Revised Statutes of the United States?

"(4) If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side line of his location?

"(5) On the facts presented by the record herein, has the appellee the right to follow its vein downward beyond its west line, and under the surface of the premises of appellant?"

MR. JUSTICE BREWER: The questions thus presented are not only important, but difficult, involving as they do the construction of the statutes of the United States in respect to mining claims. As leading up to a clearer understanding of those statutes, it may be well to notice the law in existence prior thereto. The general rule of the common law was that whoever had the fee of the soil owned all below the surface, and this common law is the general law of the states and territories of the United States, and, in the absence of specific statutory provisions or contracts, the simple inquiry as to the extent of mining rights would be, who owns the surface? Unquestionably, at common law the owner of the soil might convey his interest in mineral beneath the surface without relinquishing his title to the surface, but the possible fact of a separation between the ownership of the surface and the ownership of mines beneath that surface, growing out of contract, in no manner abridged the general proposition that the owner of the surface owned all beneath. It is said by Lindley, in his work on Mines (volume 1, § 4), that in certain parts of England and Wales so-called local customs were recognized which modified the general rule of the common law, but the existence of such exceptions founded upon such local customs only accentuates the general rule. The Spanish and Mexican mining law confined the owner of a mine to perpendicular lines on every side. Mining Co. v. Tarbet, 98 U. S. 463, 468; 1 Lindl. Mines, § 13. The peculiarities of the Mexican law are discussed by Lindley at some length in the section referred to. It is enough here to notice the fact that by the Mexican as by the common law the surface rights limited the rights below the surface.

In the acquisition of foreign territory since the establishment of this government the great body of the land acquired became the property of the United States, and is known as their "public lands." By virtue of this ownership of the soil the title to all

mines and minerals beneath the surface was also vested in the government. For nearly a century there was practically no legislation on the part of congress for the disposal of mines or mineral lands. The statute of July 26, 1866 (14 Stat. 251), was the first general statute providing for the conveyance of mines or minerals. Previous to that time it is true that there had been legislation respecting leases of mines, as, for instance, the act of March 3, 1807 (2 Stat. 448, § 5), which authorized the president to lease any lead mine in the Indiana territory for a term not exceeding five years; and acts providing for the sale of lands containing lead mines in special districts (4 Stat. 364; 9 Stat. 37, 146, 179); also such legislation as is found in the act of February 27, 1865 (13 Stat. 440), providing for a district and circuit court for the district of Nevada, in which it was said, in section 9: "That no possessory action between individuals in any of the courts of the United States for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land on which such mines are, is in the United States, but each case shall be adjudged by the law of possession;" that of May 5, 1866 (14 Stat. 43), concerning the boundaries of the state of Nevada, which provided that "all possessory rights acquired by citizens of the United States to mining claims, discovered, located, and originally recorded in compliance with the rules and regulations adopted by miners in the Pah-Ranagat and other mining districts in the territory incorporated by the provisions of this act into the state of Nevada shall remain as valid subsisting mining claims; but nothing herein contained shall be so construed as granting a title in fee to any mineral lands held by possessory titles in the mining states and territories"; and the act of July 25, 1866 (14 Stat. 242), which, granting to A. Sutro and his assigns certain privileges to aid in the construction of a tunnel, conferred upon the grantees the right of pre-emption of lodes within 2,000 feet on each side of said tunnel. Two laws were also passed regulating the sale and disposal of coal lands: one on July 1, 1864, and one on March 3, 1865. 13 Stat. 343, 529.

Notwithstanding that there was no general legislation on the part of congress, the fact of explorers searching the public domain for mines, and their possessory rights to the mines by them discovered, was generally recognized, and the rules and customs

of miners in any particular district were enforced as valid. As said by this court in Sparrow v. Strong, 3 Wall. 97, 104: "We know, also, that the territorial legislature has recognized by statute the validity and binding force of the rules, regulations, and customs of the mining districts. And we cannot shut our eyes to the public history, which informs us that under this legislation, and not only without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country." See, also, Forbes v. Gracey, 94 U. S. 762; Jennison v. Kirk, 98 U. S. 453–459; Broder v. Water Co., 101 U. S. 274–276; Manuel v. Wulff, 152 U. S. 505–510, 14 Sup. Ct. 651; Black v. Mining Co., 163 U. S. 445, 449, 16 Sup. Ct. 1101.

The act of 1866 was, however, as we have said, the first general legislation in respect to the disposal of mines. The first section provided: (first section quoted from).

The second section gave to a claimant of a vein or lode of quartz, or other rock in place, bearing gold, etc., the right "to file in the local land office a diagram of the same, * * * and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition." The purpose here manifested was the conveyance of the vein, and not the conveyance of a certain area of land within which was a vein. Section 3, which set forth the steps necessary to be taken to secure a patent, and required the payment of five dollars per acre for the land conveyed, added: "But said plat, survey, or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued." Nowhere was there any express limitation as to the amount of land to be conveyed, the provision in section 4 being: (fourth section quoted from). Obviously, the statute contemplated the patenting of a certain number of feet of the particular vein claimed by the locator, no matter how irregular its course, made no provision as to the surface area or the form of the surface location, leaving the land department in each particular case to grant so much of the surface as was

"fixed by local rules," or was, in the absence of such rules, in its judgment, necessary for the convenient working of the mine. The party to whom the vein was thus patented was permitted to follow it on its dip to any extent, although thereby passing underneath lands to which the owner of the vein had no title.

As might be expected, the patents issued under this statute described surface areas very different, and sometimes irregular in form. Often they were like a broom, there being around the discovery shaft an amount of ground deemed large enough for the convenient working of the mine, and a narrow strip extending therefrom as the handle of the broom. This strip might be straight or in a curved or irregular line, following, as was supposed, the course of the vein. Sometimes the surface claimed and patented was a tract of considerable size, so claimed with the view of including the apex of the vein, in whatever direction subsequent explorations might show it to run. And again, where there were local rules giving to the discoverer of a mine possessory rights in a certain area of surface, the patent followed those rules, and conveyed a similar area. Even under this statute, although its express purpose was primarily to grant the single vein, yet the rights of the patentee beneath the surface were limited and controlled by his rights upon the surface. If, in fact, as shown by subsequent explorations, the vein, on its course or strike, departed from the boundary lines of the surface location, the point of departure was the limit of right. In other words, he was not entitled to the claimed and patented number of feet of the vein, irrespective of the question whether the vein in its course departed from the lines of the surface location.

The litigation in respect to the Flagstaff Mine in Utah illustrates this. There was a local custom giving to the locator of a mine 50 feet in width on either side of the course of the vein, and the Flagstaff patent granted a superficies 100 feet wide by 2,600 feet long, with the right to follow the vein described therein to the extent of 2,600 feet. It turned out that the vein, instead of running through this parallelogram lengthwise, crossed the side lines, so that there was really but 100 feet of the length of the vein within the surface area. On either side of the Flagstaff ground were other locations, through which the vein, on its course, passed. As against these two locations the owners of the Flagstaff claimed the right to follow the vein on its course

or strike to the full extent of 2,600 feet. This was denied by the supreme court of Utah. McCormick v. Varnes, 2 Utah, 355. In that case the controversy was with the location on the west of the Flagstaff. The decision of that court in respect to the controversy with the location on the east of the Flagstaff is not reported, but the case came to this court. Mining Co. v. Tarbet, 98 U. S. 463. In the course of the opinion (pages 467, 468) it was said:

"It was not the intent of the law to allow a person to make his location crosswise of a vein, so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that one hundred feet is all he has a right to."

These decisions show that, while the express purpose of the statute was to grant the vein for so many feet along its course, yet such grant could only be made effective by a surface location covering the course to such extent. This act of 1866 remained in force only six years, and was then superseded by the act of May 10, 1872 (17 Stat. 91), found in the Revised Statutes (section 2319 and following). This is the statute which is in force to-day, and under which the controversies in this case arise. Section 2319, Rev. St. (corresponding to section 1 of the act of 1872), reads: (section quoted from).

It needs no argument to show that, if this were the only section bearing upon the question, patents for land containing mineral would, except in cases affected by local customs and rules of miners, be subject to the ordinary rules of the common law, and would convey title to only such minerals as were found beneath the surface. We therefore turn to the following sections to see what extralateral rights are given, and upon what conditions they may be exercised. And it must be borne in mind in considering the questions presented that we are dealing simply with statutory rights. There is no showing of any local customs

or rules affecting the rights defined in and prescribed by the statute, and beyond the terms of the statute courts may not go. They have no power of legislation. They cannot assume the existence of any natural equity, and rule that by reason of such equity a party may follow a vein into the territory of his neighbor, and appropriate it to his own use. If cases arise for which congress has made no provision, the courts cannot supply the defect. Congress having prescribed the conditions upon which extralateral rights may be acquired, a party must bring himself within those conditions, or else be content with simply the mineral beneath the surface of his territory. It is undoubtedly true that the primary thought of the statute is the disposal of the mines and minerals, and in the interpretation of the statute this primary purpose must be recognized, and given effect. Hence, whenever a party has acquired the title to ground within whose surface area is the apex of a vein with a few or many feet along its course or strike, a right to follow that vein on its dip for the same length ought to be awarded to him if it can be done, and only if it can be done, under any fair and natural construction of the language of the statute. If the surface of the ground was everywhere level, and veins constantly pursued a straight line, there would be little difficulty in legislation to provide for all contingencies; but mineral is apt to be found in mountainous regions where great irregularity of surface exists, and the course or strike of the veins is as irregular as the surface, so that many cases may arise in which statutory provisions will fail to secure to a discoverer of a vein such an amount thereof as equitably it would seem he ought to receive. We make these observations because we find in some of the opinions assertions by the writers that they have devised rules which will work out equitable solutions of all difficulties. Perhaps those rules may have all the virtues which are claimed for them, and, if so, it were well if congress could be persuaded to enact them into statute; but, be that as it may, the question in the courts is not what is equity, but what saith the statute. Thus, for instance, there is no inherent necessity that the end lines of a mining claim should be parallel, yet the statute has so specifically prescribed. Section 2320. It is not within the province of the courts to ignore such provision, and hold that a locator, failing to comply with its terms, has all the rights, extralateral and otherwise, which he

would have been entitled to if he had complied; and so it has been adjudged. Iron Silver Min. Co. v. Elgin Mining & Smelting Co., 118 U. S. 196, 6 Sup. Ct. 1177. * * *

That this decision and that in the Tarbet Case, supra, were correct expositions of the statute, and correctly comprehended the intent of congress therein, is evident from the fact that, although they were announced in 1885 and 1878, respectively, congress has not seen fit to change the language of the statute, or in any manner to indicate that any different measure of rights should be awarded to a mining locator.

With these preliminary observations, we pass to a consideration of the questions propounded. The first is:

"May any of the lines of a junior lode location be laid within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location?"

By section 2319, quoted above, the mineral deposits which are declared to be open to exploration and purchase are those found in lands belonging to the United States, and such lands are the only ones open to occupation and purchase. While this is true, it is also true that until the legal title has passed the public lands are within the jurisdiction of the land department, and although equitable rights may be established, congress retains a certain measure of control. Lumber Co. v. Rust, 168 U. S. 589, 18 Sup. Ct. 208. The grant is, as is often said, in process of administration. Passing to section 2320, beyond the recognition of the governing force of customs and regulations and a declaration as to the extreme length and width of a mining claim it is provided that: "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. * * * The end lines of each claim shall be parallel to each other." (Various provisions of sections 2322, 2324, 2325 and 2326 quoted.)

These are the only provisions of the statute which bear upon the question presented.

The stress of the argument in favor of a negative answer to this question lies in the contention that by the terms of the statute exclusive possessory rights are granted to the locator. Section 2322 declares that the locators "shall have the exclusive

right of possession and enjoyment of all the surface included within the lines of their locations," and negatively that "nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another." Hence it is said that affirmatively and negatively is it provided that the locator shall have exclusive possession of the surface, and that no one shall have a right to disturb him in such possession. How, then, it is asked, can any one have a right to enter upon such location for the purpose of making a second location? If he does so, he is a trespasser, and it cannot be presumed that congress intended that any rights should be created by a trespass.

We are not disposed to undervalue the force of this argument, and yet are constrained to hold that it is not controlling. It must be borne in mind that the location is the initial step taken by the locator to indicate the place and extent of the surface which he desires to acquire. It is a means of giving notice. That which is located is called in section 2320 and elsewhere a "claim" or a "mining claim." Indeed, the words "claim" and "location" are used interchangeably. This location does not come at the end of the proceedings, to define that which has been acquired after all contests have been adjudicated. The location, the mere making of a claim, works no injury to one who has acquired prior rights. Some confusion may arise when locations overlap each other, and include the same ground, for then the right of possession becomes a matter of dispute, but no location creates a right superior to any previous valid location. And these possessory rights have always been recognized and disputes concerning them settled in the courts.

It will also be noticed that the locator is not compelled to follow the lines of the government surveys, or to make his location in any manner correspond to such surveys. The location may, indeed, antedate the public surveys; but, whether before or after them, the locator places his location where, in his judgment, it will cover the underlying vein. The law requires that the end lines of the claim shall be parallel. It will often happen that locations which do not overlap are so placed as to leave between them some irregular parcel of ground. Within that, it being no more than one locator is entitled to take, may be

discovered a mineral vein, and the discoverer desire to take the entire surface, and yet it be impossible for him to do so, and make his end lines parallel, unless, for the mere purposes of location, he be permitted to place those end lines on territory already claimed by the prior locators.

Again, the location upon the surface is not made with the view of getting benefits from the use of that surface. The purpose is to reach the vein which is hidden in the depths of the earth, and the location is made to measure rights beneath the surface. The area of surface is not the matter of moment. The thing of value is the hidden mineral below, and each locator ought to be entitled to make his location so as to reach as much of the unappropriated, and perhaps only partially discovered and traced, vein, as is possible.

Further, congress has not prescribed how the location shall be made. It has simply provided that it "must be distinctly marked on the ground, so that its boundaries can be readily traced," leaving the details, the manner of marking, to be settled by the regulations of each mining district. Whether such location shall be made by stone posts at the four corners, or by simply wooden stakes, or how many such posts or stakes shall be placed along the sides and ends of the location, or what other matter of detail must be pursued in order to perfect a location, is left to the varying judgments of the mining districts. Such locations, such markings on the ground, are not always made by experienced surveyors. Indeed, as a rule, it has been and was to be expected that such locations and markings would be made by the miners themselves—men inexperienced in the matter of surveying—and so, in the nature of things, there must frequently be disputes as to whether any particular location was sufficiently and distinctly marked on the surface of the ground. Especially is this true in localities where the ground is wooded or broken. In such localities the posts, stakes or other particular marks required by the rules and regulations of the mining district may be placed in and upon the ground, and yet, owing to the fact that it is densely wooded, or that it is very broken, such marks may not be perceived by the new locator, and his own location marked on the ground in ignorance of the existence of any prior claim. And in all places, posts, stakes or other monuments, although sufficient at first, and clearly visible, may be

destroyed or removed, and nothing remain to indicate the boundaries of the prior location. Further, when any valuable vein has been discovered, naturally many locators hurry to seek by early locations to obtain some part of that vein, or to discover and appropriate other veins in that vicinity. Experience has shown that around any new discovery there quickly grows up what is called a "mining camp," and the contiguous territory is prospected, and locations are made in every direction. In the haste of such locations, the eagerness to get a prior right to a portion of what is supposed to be a valuable vein, it is not strange that many conflicting locations are made; and, indeed, in every mining camp where large discoveries have been made locations in fact overlap each other again and again. McEvoy v. Hyman, 25 Fed. 596-600. This confusion and conflict is something which must have been expected, foreseen; something which, in the nature of things, would happen, and the legislation of congress must be interpreted in the light of such foreseen contingencies.

Still again, while a location is required by the statute to be plainly marked on the surface of the ground, it is also provided in section 2324 that, upon a failure to comply with certain named conditions, the claim or mine shall be open to relocation. Now, although a locator finds distinctly marked on the surface a location, it does not necessarily follow therefrom that the location is still valid and subsisting. On the contrary, the ground may be entirely free for him to make a location upon. The statute does not provide, and it cannot be contemplated, that he is to wait until by judicial proceeding it has become established that the prior location is invalid, or has failed, before he may make a location. He ought to be at liberty to make his location at once, and thereafter, in the manner provided in the statute, litigate, if necessary, the validity of the other as well as that of his own location.

Congress has, in terms, provided for the settlement of disputes and conflicts, for by section 2325, when a locator makes application for a patent (thus seeking to have a final determination by the land department of his title), he is required to make publication and give notice so as to enable any one disputing his claim to the entire ground within his location to know what he is seeking, and any party disputing his right to all or

any part of the location may institute adverse proceedings. Then, by section 2326, proceedings are to be commenced in some appropriate court, and the decision of that court determines the relative rights of the parties. And the party who, by that judgment, is shown to be "entitled to the possession of the claim, or any portion thereof," may present a certified copy of the judgment roll to the proper land officers and obtain a patent "for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightfully possess." And that the claim may be found to belong to different persons, and that the right of each to a portion may be adjudicated, is shown by a subsequent sentence in that same section, which provides that, "if it appears from a decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, * * * and patents shall issue to the several parties according to their respective rights." So it distinctly appears that, notwithstanding the provision in reference to the rights of the locators to the possession of the surface ground within their locations, it was perceived that locations would overlap, that conflicts would arise, and a method is provided for the adjustment of such disputes. And this, too, it must be borne in mind is a statutory provision for the final determination, and is supplementary to that right to enforce temporary possession, which, in accordance with the rules and regulations of mining districts, has always been recognized.

This question is not foreclosed by any decisions of this court, as suggested by counsel. It is true, there is language in some opinions which, standing alone, seems to sustain the contention. Thus, in Belk v. Meagher, 104 U. S. 279, 284, it is said:

"Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim, and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a re-

location on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

And again, in Gwillim v. Donnellan, 115 U. S. 45, 49, 5 Sup. Ct. 1112:

"A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as bar to the second."

The question presented in each of those cases was whether a second location is effectual to appropriate territory covered by a prior subsisting and valid location, and it was held it is not. Of the correctness of those decisions there can be no doubt. A valid location appropriates the surface, and the rights given by such location cannot, so long as it remains in force, be disturbed by any acts of third parties. Whatever rights on or beneath the surface passed to the first locator can in no manner be diminished or affected by a subsequent location. But that is not the question here presented. Indeed, the form in which it is put excludes any impairment or disturbance of the substantial rights of the prior locator. The question is whether the lines of a junior lode location may be laid upon a valid senior location for the purpose of defining or securing "underground or extralateral rights not in conflict with any rights of the senior location." In other words, in order to comply with the statute, which requires that the end lines of a claim shall be parallel, and in order to secure all the unoccupied surface to which it is entitled, with all the underground rights which attach to possession and ownership of the surface, may a junior locator place an end line within the limits of a prior location?

In that aspect of the question the decisions referred to, although the language employed is general and broad, do not sustain the contention of counsel. This distinction is recognized in the text-books. Thus, in 1 Lindl, Mines, § 363, the author says: (quotation follows).

It will be seen that while the author denies the right of a second locator to enter upon the ground segregated by the first location, he recognizes the fact that overlapping locations are frequent, and declares the invalidity of the second location so far as it affects the rights vested in the prior locator, and in that he follows the cases from which we have quoted.

The practice of the land department has been in harmony with this view. The patents which were issued in this case for the Last Chance and New York claims give the entire boundaries of the original locations, and except from the grant those portions included within prior valid locations. So that on the face of each patent appears the original survey with the parallel end lines, the territory granted, and the territory excluded. The instructions from the land department to the surveyors general have been generally in harmony with this thought. Thus, in a letter from the commissioner of the land office to the surveyor general of Colorado of date November 5, 1874, reported in 1 Copp's Landowner (page 133), are these instructions:

"In this connection I would state that the surveyor general has no jurisdiction in the matter of deciding the respective rights of parties in cases of conflicting claims.

"Each applicant for a survey under the mining act is entitled to a survey of the entire mining claim as located, if held by him in accordance with the local laws and congressional enactments.

"If in running the exterior boundaries of a claim, it is found that two surveys conflict, the plat and field notes should show the extent of the conflict, giving the area which is embraced in both surveys, and also the distances from the established corners at which the exterior boundaries of the respective surveys intersect each other."

Again, in a general circular issued by the land department on November 16, 1882, found in 9 Copp's Landowner (page 162), it is said:

"The regulations of this office require that the plats and field notes of surveys of mining claims shall disclose all conflicts between such surveys and prior surveys, giving the areas of conflicts.

"The rule has not been properly observed in all cases. Your attention is invited to the following particulars, which should be observed in the survey of every mining claim:

"(1) The exterior boundaries of the claim should be represented on the plat of survey and in the field notes.

"(2) The intersections of the lines of the survey, with the lines of conflicting prior surveys, should be noted in the field notes and represented upon the plat.

"(3) Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

"(4) The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows."

Again, on August 2, 1883, in a letter from the acting commissioner to the surveyor general of Arizona, reported in 10 Copp's Landowner, p. 240, it is said:

"You state, and it is shown to be so by said diagram, that the said Grand Dipper lode, so located, is a four-sided figure with parallel end lines, the provisions of section 2320, Rev. St. U. S., being fully complied with.

"The survey of the claim made by the deputy surveyor cuts off a portion of the right end, shown to be in conflict with the Emerald lode, the easterly end line of the Emerald claim thus becoming one of the boundary lines of the said 'Grand Dipper,' and not parallel to the easterly end line of the Grand Dipper survey.

"I cannot see how you can give your approval to such survey. No reason exists why the survey lines should not conform directly to the lines of the location, they being properly run in the first instance."

It is true that on December 4, 1884, a circular letter was issued by the land department which slightly qualifies the general instructions previously issued. So that it may, perhaps, be truthfully said that the practice of the land department has not been absolutely uniform; and yet the descriptions which are found in the patents before us show that, notwithstanding the circular of 1884, the former practice still obtains.

It may be said that the statute gives to the first locator the right of exclusive possession; that an entry upon that territory with a view of making a subsequent location and marking on the ground its end and side lines is a trespass; and that to justify such an entry is to sanction a forcible trespass, and thus precipi-

tate a breach of the peace. But no such conclusion necessarily follows. The case of Atherton v. Fowler, 96 U. S. 513, illustrates this. It appeared that one Page was in lawful possession of certain premises claimed under a Mexican grant, though his title had not been confirmed by any act of congress; that while so in possession a party of persons, who had no interest or claim to any part of the land, invaded it by force, tore down the fences, dispossessed those who occupied, and built on and cultivated parts of it under pretense of establishing a right of pre-emption in the several parts which they had so seized. It was held that such forcible seizure of the premises gave no rights under the pre-emption law, and it was said (page 516):

"It is not to be presumed that congress intended, in the remote regions where these settlements are made, to invite forcible invasion of the premises of another, in order to confer the gratuitous right of preference of purchase on the invaders. In the parts of the country where these pre-emptions are usually made, the protection of the law to rights of person and property is generally but imperfect under the best of circumstances. It cannot, therefore, be believed, without the strongest evidence, that congress has extended a standing invitation to the strong, the daring, and the unscrupulous to dispossess by force the weak and the timid from actual improvements on the public lands, in order that the intentional trespasser may secure by these means the preferred right to buy the land of the government when it comes into market."

But while thus declaring that it cannot be presumed that congress countenanced any such forcible seizure of premises, the court also observed (page 516):

"Undoubtedly, there have been cases, and may be cases again, where two persons making settlement on different parts of the same quarter section of land may present conflicting claims to the right of pre-emption of the whole quarter section, and neither of them be a trespasser upon the possession of the other, for the reason that the quarter section is open, uninclosed, and neither party interferes with the actual possession of the other. In such cases, the settlement of the latter of the two may be bona fide for many reasons. The first party may not have the qualifications necessary to a pre-emptor, or he may have pre-empted other land, or he may have permitted the time for filing his declara-

tion to elapse, in which case the statute expressly declares that another person may become pre-emptor, or it may not be known that the settlements are on the same quarter."

The distinction thus suggested is pertinent here. A party who is in actual possession of a valid location may maintain that possession, and exclude every one from trespassing thereon, and no one is at liberty to forcibly disturb his possession or enter upon the premises. At the same time the fact is also to be recognized that these locations are generally made upon lands open, uninclosed, and not subject to any full actual occupation, where the limits of possessory rights are vague and uncertain, and where the validity of apparent locations is unsettled and doubtful. Under those circumstances it is not strange—on the contrary, it is something to be expected and, as we have seen, is a common experience—that conflicting locations are made, one overlapping another, and sometimes the overlap repeated by many different locations. And while, in the adjustment of those conflicts, the rights of the first locator to the surface within his location, as well as to veins beneath his surface, must be secured and confirmed, why should a subsequent location be held absolutely void for all purposes, and wholly ignored? Recognizing it so far as it establishes the fact that the second locator has made a claim, and in making that claim has located parallel end lines, deprives the first locator of nothing. Certainly, if the rights of the prior locator are not infringed upon, who is prejudiced by awarding to the second locator all the benefits which the statute gives to the making of a claim? To say that the subsequent locator must—when it appears that his lines are to any extent upon territory covered by a prior valid location—go through the form of making a relocation, simply works delay, and may prevent him, as we have seen, from obtaining an amount of surface to which he is entitled, unless he abandons the underground and extralateral rights which are secured only by parallel end lines.

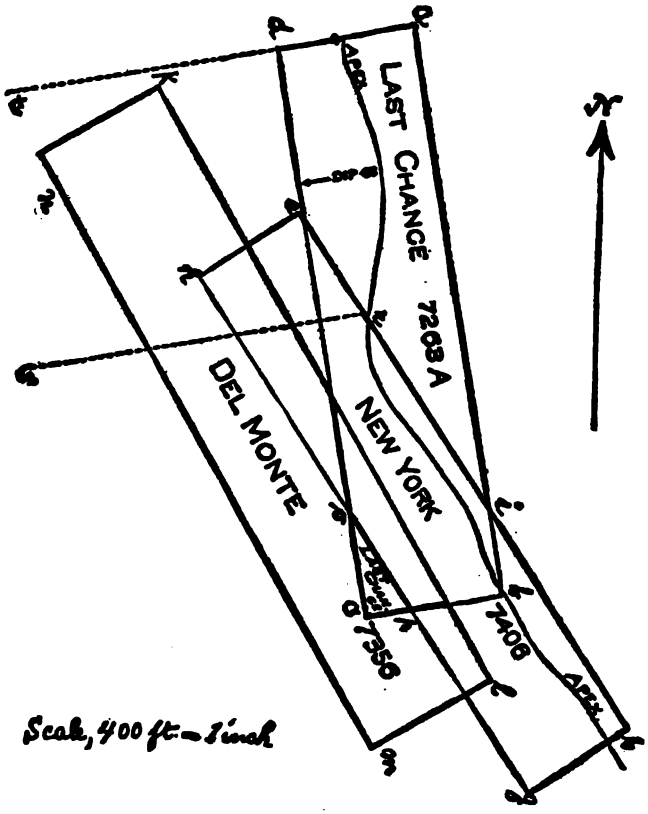
In this connection it may be properly inquired, what is the significance of parallel end lines? Is it to secure to the locator in all cases a tract in the shape of a parallelogram? Is it that the surveys of mineral land shall be like the ordinary public surveys in rectangular form, capable of easy adjustment, and showing upon a plat that even measurement which is so marked

a feature of the range, township, and section system? Clearly not. While the contemplation of congress may have been that every location should be in the form of a parallelogram, not exceeding 1,500 by 600 feet in size, yet the purpose also was to permit the location in such a way as to secure not exceeding 1,500 feet of the length of a discovered vein, and it was expected that the locator would so place it as, in his judgment, would make the location lengthwise cover the course of the vein. There is no command that the side lines shall be parallel, and the requisition that the end lines shall be parallel was for the purpose of bounding the underground extralateral rights which the owner of the location may exercise. He may pursue the vein downward outside the side lines of his location, but the limits of his right are not to extend on the course of the vein beyond the end lines projected downward through the earth. His rights on the surface are bounded by the several lines of his location, and the end lines must be parallel, in order that going downward he shall acquire no further length of the vein than the planes of those lines extended downward inclose. If the end lines are not parallel, then, following their planes downward, his rights will be either converging and diminishing or diverging and increasing the further he descends into the earth. In view of this purpose and effect of the parallel end lines, it matters not to the prior locator where the end lines of the junior location are laid. No matter where they may be, they do not disturb to the slightest his surface or underground rights.

For these reasons, therefore, we are of opinion that the first question must be answered in the affirmative.

It may be observed in passing that the answer to this question does not involve a decision as to the full extent of the rights beneath the surface which the junior locator acquires. In other words, referring to the * * * diagram, p. 826, the inquiry is not whether the owners of the Last Chance have a right to pursue the vein as it descends into the ground south of the dotted line r, s, even though they should reach a point in the descent in which the rights of the owners of the New York, the prior location, have ceased. It is obvious that the line e, h, the end line of the New York claim, extended downward into the earth will at a certain distance pass to the south of the line r, s, and a triangle of the vein will be formed between the two lines, which does not pass

to the owners of the New York. The question is not distinctly presented whether that triangular portion of the vein up to the limits of the south end line of the Last Chance, b, c, extended vertically into the earth, belongs to the owners of the Last Chance or not, and therefore we do not pass upon it. Perhaps the rights of the junior locator below the surface are limited to the length of the vein within the surface of the territory patented to him, but it is unnecessary now to consider that matter. All



that comes fairly within the scope of the question before us is the right of the owners of the Last Chance to pursue the vein as it dips into the earth westwardly between the line a, d, t and the line r, s, and to appropriate so much of it as is not held by the prior location of the New York, and to that extent only is the question answered. The junior locator is entitled to have

the benefit of making a location with parallel end lines. The extent of that benefit is for further consideration.

The second question needs no other answer than that which is contained in the discussion we have given to the first question, and we therefore pass it.

The third question is also practically answered by the same considerations, and, in the view we have taken of the statutes, the easterly side of the New York lode mining claim is not the end line of the Last Chance lode mining claim.

The fourth question presents a matter of importance, particularly in view of the inferences which have been drawn by some trial courts, state and national, from the decisions of this court. That question is:

"If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side line of his location?"

The decisions to which we refer are Mining Co. v. Tarbet, 98 U. S. 463; Iron Silver Min. Co. v. Elgin Mining & Smelting Co., 118 U. S. 196, 6 Sup. Ct. 1177; Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 478, 7 Sup. Ct. 1356; King v. Mining Co., 152 U. S. 222, 14 Sup. Ct. 510.

Two of these cases have been already noticed in this opinion. In Mining Co. v. Tarbet a surface location 2,600 feet long and 100 feet wide had been made. This location was so made on the supposition that it followed lengthwise the course of the vein, and the claim was of the ownership of 2,600 feet in length of such vein. Subsequent explorations developed that the course of the vein was at right angles to that which had been supposed, and that it crossed the side lines, so that there was really but 100 feet of the length of the vein within the surface area. It was held that the side lines were to be regarded as the end lines. In Iron Silver Min. Co. v. Elgin Min. Co. the location was in the form of a horseshoe. The end lines were not parallel. The location was quite irregular in form, and, inasmuch as one of the side lines was substantially parallel with one of the end lines, it was contended that this side line should be considered an end line, and this although the vein did not pass through such side line. But the court refused to recognize any such contention, and held that the end lines were those which were

in fact end lines of the claim as located, and that, as they were not parallel, there was no right to follow the vein on its dip beyond the side lines. In Argentine Min. Co. v. Terrible Min. Co., the claims of the plaintiff and defendant crossed each other, and in its decision the court affirmed the ruling in Mining Co. v. Tarbet, saying (page 485, 98 U. S.):

"When, therefore, a mining claim crosses the course of the lode or vein instead of being 'along the vein or lode,' the end lines are those which measure the width of the claim as it crosses the lode. Such is evidently the meaning of the statute. The side lines are those which measure the extent of the claim on each side of the middle of the vein at the surface."

In King v. Mining Co. the prior cases were reaffirmed, and those lines which on the face of the location were apparently side lines were adjudged end lines because the vein on its course passed through them, the location being not along the course of the vein but across it. But in neither of these cases was the question now before us presented or determined. All that can be said to have been settled by them is: First, that the lines of the location as made by the locator are the only lines that will be recognized; that the courts have no power to establish new lines or make a new location; second, that the contemplation of the statute is that the location shall be along the course of the vein, reading, as it does, that a mining claim "may equal, but shall not exceed, 1,500 feet in length along the vein or lode"; and, third, that when subsequent explorations disclose that the location has been made not along the course of the vein, but across it, the side lines of the location become in law the end lines. Nothing was said in either of these cases as to how much of the apex of the vein must be found within the surface, or what rule obtains in case the vein crosses only one end line. So, when Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 696, 15 Sup. Ct. 733, was before us (in which the question here stated was presented, but not decided, the case being disposed of on another ground), we said, after referring to the prior cases. "But there has been no decision as to what extra-territorial rights exist if a vein enters at one end and passes out at a side line."

We pass, therefore, to an examination of the provisions of the statute. Premising that the discoverer of a vein makes the

location; that he is entitled to make a location not exceeding 1,500 feet in length along the course of such vein, and not exceeding "three hundred feet on each side of the middle of the vein at the surface"; that a location thus made discloses end and side lines; that he is required to make the end lines parallel; that by such parallel end lines he places limits not merely to the surface area, but limits beyond which below the surface he cannot go on the course of the vein; that it must be assumed that he will take all of the length of the vein that he can,—we find from section 2322 that he is entitled to "all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. He is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines. Not only is he entitled to all veins whose apexes are within such limits, but he is entitled to them throughout their entire depth, "although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." In other words, given a vein whose apex is within his surface limits he can pursue that vein as far as he pleases in its downward course outside the vertical side lines. But he can pursue the vein in its depth only outside the vertical side lines of his location, for the statute provides that the "right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or lodes."

This places a limit on the length of the vein beyond which he may not go, but it does not say that he shall not go outside the vertical side lines unless the vein in its course reaches the vertical planes of the end lines. Nowhere is it said that he must have a vein which either on or below the surface extends from end line to end line in order to pursue that vein in its dip outside the vertical side lines. Naming limits beyond which a grant does

not go is not equivalent to saying that nothing is granted which does not extend to those limits. The locator is given a right to pursue any vein whose apex is within his surface limits, on its dip outside the vertical side lines, but may not in such pursuit go beyond the vertical end lines. And this is all that the statute provides. Suppose a vein enters at an end line, but terminates half way across the length of the location, his right to follow that vein on its dip beyond the vertical side lines is as plainly given by the statute as though in its course it had extended to the further end line. It is a vein, "the top or apex of which lies outside of such surface lines extended downward vertically." And the same is true if it enters at an end and passes out at a side line.

Our conclusions may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface; second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike; third, every vein "the top or apex of which lies inside of such surface lines extended downward vertically" becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor; fourth, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed, not along, but across, the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines; and this upon the proposition that it was the intent of congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location. "Our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular." Mining Co. v. Tarbet, 98 U. S. 463, 468.

These conclusions find support in the following decisions: Stevens v. Williams, 1 McCrary, 480, 490, Fed. Cas. No. 13,413, in which is given the charge of Mr. Justice Miller to a jury. * * * Wakeman v. Norton (decided by the supreme court of Colorado, June 1, 1897), 49 Pac. 283, in which Mr. Justice Goddard, whose opinions, by virtue of his long experience as trial judge in the mining districts of Leadville and Aspen, as well as on the supreme bench of the state, are entitled to great consideration, said (page 286): "In instructing the jury that, in order to give any extralateral rights, it was essential that the apex or top of a vein should on its course pass through both end lines of a claim, the court imposed a condition that has not heretofore been announced as an essential to the exercise of such right in any of the adjudicated cases." Fitzgerald v. Clark, 17 Mont. 100, 42 Pac. 273,—a case now pending in this court on writ of error. Tyler Min. Co. v. Last Chance Min. Co. (court of appeals, Ninth circuit, decided by Circuit Judge McKenna, now a justice of this court, Circuit Judge Gilbert, and District Judge Hawley), 7 U. S. App. 463, 4 C. C. A. 329, and 54 Fed. 284. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (circuit court, Northern district, California, decided by Hawley, District Judge), 63 Fed. 540. Tyler Min. Co. v. Last Chance Min. Co. (circuit court, district of Idaho). * * * 71 Fed. 848, 851. Carson City Gold & Silver Min. Co. v. North Star Min. Co. (circuit court, Northern district of California, decided by Beatty, District Judge), 73 Fed. 597. Republican Min. Co. v. Tyler Min. Co. (circuit court of appeals, Ninth circuit, decided by Circuit Judges Gilbert and Ross and District Judge Hawley), 48 U. S. App. 213, 25 C. C. A. 178, and 79 Fed. 733. See, also 2 Lindl. Mines, § 591.

The fourth question, therefore, is answered in the affirmative.

The fifth question, in effect, seeks from this court a decision of the whole case, and therefore is not one which this court is called upon to answer. Cross v. Evans, 167 U. S. 60, 17 Sup. Ct. 733; Warner v. New Orleans, 167 U. S. 467, 17 Sup. Ct. 892.

It will therefore be certified to the court of appeals that the first question is answered in the affirmative, the third in the negative, the fourth in the affirmative. The second and fifth are not answered.

CHAPTER VI.

THE LOCATION OF PLACERS, TUNNEL RIGHTS AND MILL SITES.

Tunnel Rights.

CREEDE & CRIPPLE CREEK M. & M. CO. v. UINTA TUNNEL MIN. & TRANS. CO.

196 U. S. 337, 25 Sup. Ct. 266. 1905.

MR. JUSTICE BREWER. * * * The matter to be determined is the sufficiency of the defenses pleaded and stricken out. * * *.

In a general way it may be said that the defenses which were stricken out were a priority of right and an estoppel. We quote these paragraphs from the answer:

"It further avers that the patent of the United States issued for said Ocean Wave and Little Mary lodes and lode mining claims was issued subject to the act of Congress in reference to tunnel rights, and subject to the laws of the state of Colorado in reference to the right to run tunnels through ground that may be patented, for the purpose of reaching territory that belongs to tunnel owners beyond such patented claims, and subject to the rights which the defendant, The Uinta Tunnel Mining & Transportation Company and its grantors, had acquired by reason of the location of said Uinta tunnel, and in and to any and all lodes, veins, and mining claims that it might cut or discover in driving said tunnel, as is guaranteed to the locator of said tunnel under and by virtue of § 2323 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1426); that the pretended discovery alleged and pretended to have been made in and upon said pretended Ocean Wave and Little Mary lodes and lode mining claims, and by virtue of which the plaintiff claims the right to patent the same under the laws of the United States, was not made until long after the location of said Uinta tunnel,

and at the time said pretended locations were made said locators thereof were advised and knew that said tunnel had been located and had been and was being prosecuted with due diligence and in strict compliance with the terms and conditions of the statutes of the United States and of the state of Colorado, which authorize and provide for the location and prosecution of such tunnels, and which define and determine the rights pertaining thereto; and that said pretended Ocean Wave and Little Mary lode mining claims, so far as the same may be now claimed and possessed by said plaintiff, were taken and held subject to the rights of this defendant as owner of said Uinta tunnel, located in accordance with § 2323 of the Revised Statutes of the United States, and also subject to the rights of this defendant to cross said claims, and to drive drifts therein, and to follow said lode claims as located by this defendant, and to reach lode claims so owned by this defendant, as hereinbefore and hereinafter stated.

"It alleges that it and its grantors have expended in and upon said tunnel the sum of more than one hundred and twenty-five thousand dollars ($125,000), and in addition to said expenditures have also expended upon surface work, in improvements and expenses, the further sum of not less than ten thousand dollars ($10,000).

"It alleges that its work and the work of its said grantors in and upon said tunnel has been done openly and without concealment; that the same has been at all times prosecuted under the claim of the defendant and its grantors of the right so to do by virtue of the location of said tunnel and tunnel site location, under and by virtue of the laws of the United States, and under the provisions of § 2323 of the Revised Statutes of the United States; and that the expenditures thereof and the developments made thereon have been made in compliance with the terms and provisions of, and in reliance upon, said statute.

"That the plaintiff, by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars ($135,000) as aforesaid in reaching, uncovering, and discovering said ore body, has no right to interfere with the defendant in operating its tunnel over, through, and along said pretended Ocean Wave and Little Mary lodes and lode mining claims, but that, on the contrary,

the plaintiff, by its conduct and actions in the premises as hereinabove recited and set forth, has permitted and allowed the defendant to expend said sum of one hundred and thirty-five thousand dollars ($135,000), and has permitted and allowed the defendant so to proceed with said tunnel through and across said pretended Ocean Wave and Little Mary lodes and lode mining claims until the same has ripened into such a license and permission as entitled the defendant to use its said tunnel as it penetrates said pretended Ocean Wave and Little Mary lodes and lode mining claims, and that said license and permission is such that the defendant cannot be disturbed therein."

It was also alleged that the tunnel had been driven some 2,200 feet; that it entered the ground of the plaintiff at about 550 feet from its portal, and in running through that ground the tunnel was driven 625 feet, leaving the plaintiff's ground at about 1,175 feet from the portal; that after passing it the defendant discovered in the tunnel three or four blind lodes, which it duly located; and it was not until after the discovery and location of these lodes that the plaintiff commenced this action.

Was there error in striking out these defenses? By § 2319, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1424), "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase." Until, therefore, the title to the land passes from the government, the minerals therein are "free and open to exploration and purchase." A lode locator acquires a vested property right by virtue of his location (Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632); but what is the extent of that property right? Section 2322 (U. S. Comp. Stat. 1901, p. 1425) defines it as follows: (Section quoted from). The express grant to the locator made by this section includes only the surface and the veins apexing within the boundaries of the location. Until, therefore, by entry and payment to the government, the equitable title to the ground passes to the locator, he is in no position to question any rights of exploration which are granted by other provisions of the statute. The fee still remains in the government. By § 2320

(U. S. Comp. Stat. 1901, p. 1424) it is provided that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." And by § 2324 (U. S. Comp. Stat. 1901, p. 1426): (Section quoted from). Tunnel rights are granted by § 2323 (U. S. Comp. Stat., p. 1426) which reads: (Section quoted from).

It does not appear from the answer or testimony that the tunnel had reached the boundaries of the plaintiff's claims prior to the entry or even prior to the patent. For the purpose of this case, therefore, we must assume that, although its line had been marked out,—a line extending through the plaintiff's ground,—yet in fact no work had been done within such ground prior to the patent.

The propositions upon which the plaintiff relies are that discovery is the initial fact; that the patent when issued relates back to that initial fact and confirms all rights as of that date; that no inquiry is permissible as to the time of that discovery, it being concluded by the issue of the patent; that such time antedated anything done in or for the tunnel; that no adverse proceedings were instituted after it had applied for patent, and that, therefore, its right became vested in the ground, the same right which any other landowner has, and which could not be disturbed by the defendant by means of its tunnel. St. Louis Min. & Mill. Co. v. Montana Min. Co., 194 U. S. 235, 48 L. ed. 953, 24 Sup. Ct. Rep. 654.

On the other hand, defendant contends that as the first record in any office of the government was the record of the entry on August 5, 1893, the patent issued in an ex parte proceeding is conclusive only that every preceding step, including discovery, had then been taken; that it in fact located its tunnel site prior to any discovery or marking on the ground of plaintiff's claim; that it was not called upon to adverse plaintiff's application for a patent, because no patent is ever issued for a tunnel, and it had not then discovered any veins within its tunnel; that plaintiff, with full knowledge of defendant's tunnel location, permitted the driving of the tunnel through its ground and beyond, at an expenditure of $135,000, and made no objection until the discovery of the veins beyond its ground, and then, for the first time, and to prevent defendant from developing such veins, brought this action, and

that by such acquiescence it was now estopped to question defendant's use of the tunnel.

Obviously the parties divide as to the effect of plaintiff's patent. The circuit court held with the plaintiff, the court of appeals with the defendant. It may be conceded that a patent is conclusive that the patentee has done all required by law as a condition of the issue; that it relates to the initiation of the patentee's right, and cuts off all intervening claims. It may also be conceded that discovery of mineral is the initial fact. But when did the initial fact take place? Are all other parties concluded by the locator's unverified assertion of the date or the acceptance by the government of his assertion as sufficient, with other matters, to justify the issue of a patent? Undoubtedly, so far as the question of time is essential to the right, the patent is conclusive, but is it beyond that?

In order to reach a clear understanding of the question it seems necessary to consider the legislation. Three things are provided for: discovery, location, and patent. The first is the primary, the initial fact. The others are dependent upon it, and are the machinery devised by Congress for securing to the discoverer of mineral the full benefit of his discovery. Chap. 6 of Title 32, Rev. Stat., is devoted to the subject of "Mineral Lands and Mining Resources." The first section, 2318 (U. S. Comp. Stat. 1901, p. 1423), reserves mineral lands for sale, except as expressly directed. The next provides that all valuable mineral deposits in government lands shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase. In the next it is declared that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim. The whole scope of the chapter is the acquisition of title from the United States to mines and mineral lands, the discovery of the mineral being, as stated, the initial fact. Without that no rights can be acquired. As said by Lindley, in his work on Mines, 2d ed., vol. 1, § 335: (See same quotation in Lawson v. U. S. Mining Co. preceding, which may be found on page 796).

Location is the act or series of acts by which the right of exclusive possession of mineral veins and the surface of mineral lands is vested in the locator. For this the only require-

ment made by Congress is the marking on the surface of the boundaries of the claim. By § 2324 (U. S. Comp. Stat. 1901, p. 1426), however, Congress recognized the validity of any regulations made by the miners of any mining district not in conflict with the laws of the United States or the laws of the state or territory within which the district is situated. This is held to authorize legislation by the state. Thus, in Belk v. Meagher, 104 U. S. 279, 284, 26 L. ed. 735, 737, it was said:

"A location is not made by taking possession alone, but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations."

In Kendall v. San Juan Silver Min. Co., 144 U. S. 658, 664, 36 L. ed. 583, 585, 12 Sup. Ct. Rep. 779, 781, is this language:

"Section 2324 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1426) makes the manner of locating mining claims and recording them subject to the laws of the state or territory, and the regulations of each mining district, when they are not in conflict with the laws of the United States."

See also Erhardt v. Boaro, 113 U. S. 527, 533, 534, 535, 28 L. ed. 1113, 1115, 1116, 5 Sup. Ct. Rep. 560; Butte City Water Co. v. Baker, 196 U. S. 119, 25 Sup. Ct. Rep. 221, 49 L. ed. 409.

And many territories and states (Colorado among the number) have made provisions in respect to the location other than the mere marking on the ground of the boundaries of the claim. So, before a location in those states is perfected, all the provisions of the state statute as well as of the Federal must be complied with, for location there does not consist in a single act. In Morrison, Mining Rights, 11th ed., p. 37, the author, having primarily reference to the laws of Colorado, says:

"The location of a lode consists in defining its position and boundaries, and in doing such acts as indicate and publish the intention to occupy and hold it under the license of the United States. The formal parts of location include: 1, the location notice at discovery; 2, the discovery shaft; 3, the boundary stakes."

In St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636,

649, 26 L. ed. 875, 879, Justice Field, referring to the fact that the terms "location" and "mining claim" are often indiscriminately used to denote the same thing, says by way of definition:

"A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel, according to certain established rules."

See also Northern P. R. Co. v. Sanders, 1 C. C. A. 192, 7 U. S. App. 47, 49 Fed. 129, 135.

The patent is the instrument by which the fee-simple title to the mining claim is granted.

Returning now to the matter of location the Colorado statutes in substance require—

"1. To place at the point of discovery, on the surface, a notice containing the name of the lode, the name of the locator, and the date of the discovery.

"2. Within sixty days from the discovery, to sink a discovery shaft 10 feet deep, showing a well-defined crevice.

"3. To mark the surface boundaries by six posts, one at each corner and one at the center of each side line, hewed or marked on the side or sides in towards the claim.

"4. The disclosure of the lode in an open cut, cross cut, or tunnel suffices instead of a 10-foot shaft.

"5. Within three months from date of discovery he must file a location certificate with the county recorder giving a proper description of the claim, and containing also the name of the lode, the name of the locator, the date of the location, the number of feet in length on each side of the center of the discovery shaft, and the general course of the lode." Morrison, Mining Rights, 11th ed., p. 59.

The issue of a patent for a lode claim in Colorado is therefore not only a conclusive adjudication of the fact of the discovery of the mineral vein, but also of compliance with these several provisions of its statutes. The supreme court of that state has decided that the order is not essential, providing no intervening rights have accrued. In Brewster v. Shoemaker, 28 Colo. 176, 180, 53 L. R. A. 793, 798, 89 Am. St. Rep. 188, 190, 63 Pac. 309, 310, it said:

"The order of time in which these several acts are performed is not of the essence of the requirements, and it is immaterial

that the discovery was made subsequent to the completion of the acts of location, provided, only, all the necessary acts are done before intervening rights of third parties accrue. All these other steps having been taken before a valid discovery, and a valid discovery then following, it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their claim and refile their location certificate, or file a new one."

And that has been the general doctrine. In 1 Lindley, Mines, 2d ed. § 330, the author says:

"The order in which the several acts required by law are to be performed is non-essential, in the absence of intervening rights. The marking of the boundaries may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator. But if the boundaries are marked before discovery, the location will date from the time discovery is made."

In 1 Snyder, Mines, § 354, it is said:

"While the general rule is, as stated elsewhere in the foregoing sections, that a location must rest upon a valid discovery, yet a location otherwise good, with a discovery made after location, and before the intervention of adverse claims or the creation of adverse rights, will validate the location from the date of discovery, and generally from the first act towards claim and appropriation,—this by relation."

In Morrison, Mining Rights, 11th ed., p. 32:

"If a location be made before discovery, but is followed by a discovery in the discovery shaft, before any adverse rights intervene, such subsequent discovery cures the original defect and the claim is valid."

In Re Mitchell, 2 Land Dec. 752, it was held by Commissioner McFarland that, "although prior to location no discovery of mineral was made within the ground claimed, upon a subsequent discovery prior to application for patent the location became good and sufficient, in the absence of any adverse rights."

In Reins v. Raunheim, 28 Land Dec. 526, 529, Secretary Hitchcock declared that "it is immaterial whether the discovery occurred before or after the location, if it occurred before

the rights of others intervened. Erwin v. Perego, 35 C. C. A. 482, 93 Fed. 608."

Reference is made to the statement of Secretary Smith in Etling v. Potter, 17 Land Dec. 424, 426, as though that announced a different conclusion, that "a location certificate is but one step—the last one—in the location of a mining claim." But a location certificate is simply a certificate required by the local statute or custom that some things have been done, and, of course, it must come after those things have been done.

Again, in the same volume, pp. 545 and 546 (Northern P. R. Co. v. Marshall), he said:

"In the location of a mineral claim, placer or lode, the first requirement of the law is a discovery. §§ 2319, 2320 Rev. Stat., U. S. Comp. Stat. 1901, p. 1424. All right inuring to the benefit of the locators are based upon this initial act. Erhardt v. Boaro, 113 U. S. 537, 28 L. ed. 1116, 5 Sup. Ct. Rep. 565; United States v. Iron Silver Min. Co. 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195; O'Reilly v. Campbell, 116 U. S. 418, 29 L. ed. 669, 6 Sup. Ct. Rep. 421. When, therefore, a legal location has been made on land returned as agricultural, the slight presumption in favor of the return of the surveyor general is, ipso facto, overcome, and the burden of proof shifts to the party attacking such mineral entry. By such discovery and location it is demonstrated that the return was erroneous, and it would be trifling with physical facts to put the onus on the locator to present further evidence until it is shown that, as a matter of fact, he had no discovery."

But the question he was considering was simply as to the burden of proof between one claiming land returned as agricultural land and one claiming a portion thereof, as an apparently legal location of a mineral claim.

In North Noonday Min. Co. v. Orient Min. Co., 6 Sawy. 299, 1 Fed. 522, 531, Judge Sawyer, in charging the jury said:

"I instruct you further, that if a party should make a location in all other respects regular, and in accordance with the laws, and the rules, regulations, and customs in force at the place at the time, upon a supposed vein, before discovering the true vein or lode, and should do sufficient work to hold the claim, and after such location should discover the vein or lode within the limits of the claim located, before any

other party had acquired any rights therein, from the date of his discovery his claim would be good to the limits of his claim, and the location valid."

To the same effect was the charge of the same judge in Jupiter Min. Co. v. Bodie Consol. Min. Co. 7 Sawy. 96, 11 Fed. 666, 676.

In Cedar Canyon Consol. Min. Co. v. Yarwood, 27 Wash. 271, 91 Am. St. Rep. 841, 67 Pac. 749, the supreme court of Washington ruled that—

"In the absence of intervening rights, the fact that mineral is not discovered on a claim until after the notice of location is posted and the boundary marked is immaterial; and, where the discovery is the result of work subsequently done by the locator, his possessory rights under his location are complete from the date of such discovery. Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673; Erwin v. Perego, 35 C. C. A. 482, 93 Fed. 608; Jupiter Min. Co. v. Bodie Consol. Min. Co., 7 Sawy. 96, 11 Fed. 666; 1 Lindley, Mines, § 335, and cases cited."

See especially Erwin v. Perego, cited in this quotation, decided by the court of appeals for the eighth circuit. Tending in the same direction are Thompson v. Spray, 72 Cal. 528, 533, 14 Pac. 182; Gregory v. Pershbaker, 73 Cal. 109, 118, 14 Pac. 401; Tuolumne Consol. Min. Co. v. Maier, 134 Cal. 583, 585, 66 Pac. 863.

But what is the meaning of the statute? Its language is "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Does that require that a discovery must be made before any marking on the ground, especially when, as under the Colorado statutes, several other steps in the process of location are prescribed, or does it mean that no location shall be considered as complete until there has been a discovery? Bearing in mind that the principal thought of the chapter is exploration and appropriation of mineral, does it mean anything more than that the fact of discovery shall exist prior to the vesting of that right of exclusive possession which attends a valid location?

This may be looked at in another aspect. Suppose a discovery is not made before the marking on the ground and posting of notice, but is then made, and it and all other statu-

tory provisions are complied with before the entry, which is an application for the purchase of the ground,—of what benefit would it be to the government to require the discoverer to repeat the marking on the ground, the posting of notice, and other acts requisite to perfect a location? If everything has been done which, under the law, ought to be done to entitle the party to purchase the ground, wherein is the government prejudiced if the precise order of those acts is not followed? Or, to go a step farther, suppose, on an application for a patent, an adverse suit is instituted, and on the trial it appeared that the plaintiff in that suit had made a discovery and taken all the steps necessary for a location in the statutory order, although not until after the applicant for the patent had done everything required by law, would there be any justice in sustaining the adverse suit, and awarding the property to the plaintiff therein, on the ground that the applicant had not made any discovery until the day after his marking on the ground, and so the discovery did not precede the location?

These suggestions add strength to the concurring opinion of three leading commentators on mining law, the general trend of the rulings of the department and decisions of the courts, to the effect that the order in which the several acts are done is not essential, except so far as one is dependent on another. Doubtless a locator does not acquire the right of exclusive possession unless he has made a valid location, and discovery is essential to its validity; but if all the acts prescribed by law are done, including a discovery, is it not sacrificing substance to form to hold that the order of those acts is essential to the creation of the right? It must be remembered that the discovery and the marking on the ground are not matters of record but *in pais,* and, if disputed in an adverse suit or otherwise, must be shown, as other like facts, by parol testimony. It must also be remembered that the certificate of location required by the Colorado statutes need not be verified. The one in this case was not. A locator might, if so disposed, place the date of discovery before it was in fact made, and at any time within three months prior to the filing of the certificate.

But it has been said that the question has been decided by this court adversely to these views, and Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co., 167 U. S. 108, 42 L. ed. 96, 17

Sup. Ct. Rep. 762, and Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 182 U. S. 499, 45 L. ed. 1200, 21 Sup. Ct. Rep. 885, are cited. In the former case the question was as to when a vein discovered in a tunnel must be located, and in the opinion (p. 112, L. ed., p. 100, Sup. Ct. Rep., p. 763) we said:

"In order to make a location there must be a discovery; at least, that is the general rule laid down in the statute. Section 2320 (U. S. Comp. Stat. 1901, p. 1424) provides: 'But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.' The discovery in the tunnel is like a discovery on the surface. Until one is made there is no right to locate a claim in respect to the vein, and the time to determine where and how it shall be located arises only upon the discovery,—whether such discovery be made on the surface or in the tunnel."

But that comes far short of meeting the question before us. It is undoubtedly true that discovery is the initial fact. The language of the statute makes that plain, and parties may not go on the public domain and acquire the right of possession by the mere performance of the acts prescribed for a location. But the question here is whether, if there be both a discovery and the performance of all the acts necessary to constitute a location, the order in which these things take place is essential to the right of exclusive possession which belongs to a valid location.

In the Ajax Case the contest was between mining claims, on the one hand, and a mining claim and tunnel site, on the other. All the mining claims had passed to patent. The plaintiff in error, who was defendant below, held the junior patent issued upon a later entry, and the entries of plaintiff's claims were made and the receiver's final receipts issued prior to the location of the tunnel site. In other words, the defendant, admitting that its right to a tunnel had not been established by a location at the time of the entries of plaintiff's claims, sought to invalidate them by proof that there had been no previous discovery of mineral. This was refused by the trial court, and we sustained the ruling, saying (p. 510, L. ed., p. 1206, Sup. Ct. Rep., p. 890):

"The patents were proof of the discovery, and related back to the date of the locations of the claims. The patents could

not be collaterally attacked. This has been decided so often that a citation of cases is unnecessary."

An entry, sustained by a patent, is conclusive evidence that, at the time of the entry, there had been a valid location, and such valid location implies, as one of its conditions, a discovery; and the decision only went to the extent that this could not be challenged by one who, at the time of the entry, had made no location, and therefore had acquired no tunnel right. There is nothing in this ruling to conflict with the views we have expressed.

It would seem, therefore, from this review of the authorities as well as from the foregoing considerations that, as between the government and the locator, it is not a vital fact that there was a discovery of mineral before the commencement of any of the steps required to perfect a location, and that if, at the time of the entry, everything has been done which entitled the party to an entry, to wit, a discovery and a perfected location, the government would not be justified in rejecting the application on the ground that the customary order of procedure had not been followed. In other words, the government does not, by accepting the entry, and confirming it by a patent, determine as to the order of proceedings prior to the entry, but only that all required by law have been taken.

If, therefore, the entry and patent do not of themselves necessarily determine the order of the prior proceedings, why may not anyone who claims rights anterior to the entry, and dependent upon that order, show, as a matter of fact, what it was? One not a party to proceedings between the government and the patentee is concluded by the action of the government only so far as that action involves a determination. There is a determination by the fact of entry and patent that there was, prior to the entry, a discovery and a location. Having been so determined, third parties may be concluded thereby.

But it may be said that when the time of a particular fact is concluded by an adjudication, or when an opportunity is presented for such an adjudication, and not availed of, the time as stated must be considered as settled; that when the plaintiff applied for its patent, if there was any question to be made by the defendant of any statement of fact made in the

location certificate or other record, it should have been challenged by an adverse suit. Failing to do so, the fact must be considered to be settled as stated. Undoubtedly, if, in an adverse suit, the time of any particular matter is litigated, the judgment is conclusive; and if the date of discovery stated in the plaintiff's location certificate had been challenged in an appropriate action brought by the defendant, and determined in favor of the plaintiff, there could be now no inquiry. So, when the owner of a lode claim makes application for a patent, and the owner of another seeks to challenge the former's priority of right on account of the date of discovery, it is his duty to bring an adverse suit; and, if he fails to do so, that question will be, as to him, concluded. Such is the purpose and effect of the adverse proceedings.

Is the same rule also applicable to a tunnel site? This opens up the question of what are the rights and obligations of the owner of a tunnel. And here these facts must be borne in mind: The owner of a tunnel never receives a patent for it. There is no provision in the statute for one, and none is in fact ever issued. No discovery of mineral is essential to create a tunnel right or to maintain possession of it. A tunnel is only a means of exploration. As the surface is free and open to exploration, so is the subsurface. The citizen needs no permit to explore on the surface of government land for mineral. Neither does he have to get one for exploration beneath the surface for like purpose. Nothing is said in § 2323 (U. S. Comp. Stat. 1901, p. 1426) as to what must be done to secure a tunnel right. That is left to the miners' customs or the state statutes, and the statutes of Colorado provide for a location and the filing of a certificate of location. When the tunnel right is secured the Federal statute prescribes its extent,—a tunnel 3,000 feet in length and a right to appropriate the veins discovered in such tunnel to the same extent as if discovered from the surface.

If the tunnel right was vested before a discovery in the plaintiff's lode claim the defendant ought to have the benefit of it. The plaintiff's right does not antedate his discovery; at least it does not prevail over any then-existing right. But, it is said, the defendant did not adverse the plaintiff's application for a patent; that its omission so to do precludes it from

now asserting a right prior to the date of discovery named in the certificate of location, just as a judgment in an adverse suit involving the question of date would have been conclusive. Is the owner of a tunnel who simply seeks to protect his tunnel, and has, as yet, discovered no lode claim, bound to adverse an application for the patent of a lode claim, the lode of which was discovered on the surface? It is contended that the case of Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co., 167 U. S. 108, 42 L. ed. 96, 17 Sup. Ct. Rep. 762, decides this question. But in that case the line of the tunnel did not enter the ground of the lode claim, but ran parallel with and distant from it some 500 feet, and we held that the mere possibility that, in the line of the tunnel, might be discovered a vein which extended through the ground of the distant lode claim, did not necessitate adverse proceedings. Here the line of the tunnel runs directly through the ground of the plaintiff, and the question is distinctly presented whether, in order to protect the right to that tunnel, the defendant was called upon to adverse? Whatever might be the propriety or advantage of such action, the statute does not require it.

Sections 2325 and 2326 (U. S. Comp. Stat. 1901, pp. 1429, 1430) provide the manner of obtaining a patent and for adverse proceedings. The first commences: "A patent for any land claimed and located for valuable deposits may be obtained in the following manner." This, obviously, does not refer to easements or other rights, nor the acquisition of title to land generally, but only to land claimed and located for valuable deposits. Then, after prescribing certain proceedings, the statute adds: "If no adverse claim shall have been filed with the register * * * it shall be assumed that the applicant is entitled to a patent * * * and that no adverse claim exists." The next section commences, "where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim." The section then authorizes the commencement of an action by the adverse claimant and a stay of proceedings in the Land Department pending such action, and adds:

"After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof,

may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof, as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights."

Reading these two sections together, it is apparent that they provide for a judicial determination of a controversy between two parties contesting for the possession of "land claimed and located for valuable deposits;" in other words, the decision of a conflict between two mining claims,—a decision which will enable the Land Department, without further investigation, to issue a patent for the land. A tunnel is not a mining claim, although it has sometimes been inaccurately called one. As we have seen, it is only a means of exploration. The owner has a right to run it in the hope of finding a mineral vein. When one is found he is called upon to make a location of the ground containing that vein, and thus creates a mining claim, the protection of which may require adverse proceedings. As the claimant of the tunnel he takes no ground for which he is called upon to pay, and is entitled to no patent. A judgment in adverse proceedings instituted by him (if such proceedings were required) might operate to create a limitation on the estate of the applicant for a patent to the mining claim, and, thus as it were, engraft an exception on his patent. But, taking the whole surface, the applicant is required to pay the full price of $5 per acre, with no deduction because of the

tunnel. The statute provides for no reduction on account of any tunnel. The tunnel owner might be said to have established his right to continue the tunnel through the lode claim after patent,—a right which he undoubtedly had before patent, or at least before entry. There is no statutory warrant for placing in a patent to the owner of a lode claim any limitation of his title by a reservation of tunnel rights. In Deffeback v. Hawke, 115 U. S. 392, 406, 29 L. ed. 423, 427, 6 Sup. Ct. Rep. 95, 101, we said:

"The position that the patent to the plaintiff should have contained a reservation excluding from its operation all buildings and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of Congress. The land officers, who are merely agents of the law had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed."

Other limitations in the full title granted by a patent for a mineral claim are recognized in the statutes. Thus, by § 2339 (U. S. Comp. Stat. 1901, p. 1437), which is found in the same chapter as the other sections quoted, the one devoted to "Mineral Lands and Mining Resources," it is provided that:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledeged and confirmed."

But it has never been supposed that the owner of any of these rights was compelled to adverse an application for a patent for a mining claim, for they are not "mining claims."

The decisions on the question of the duty of the tunnel owner to adverse the application of the lode claimant are not harmonious. In Bodie Tunnel & Min. Co. v. Bechtel Consol. Min. Co., 1 Land Dec. 584, Secretary Kirkwood held that a tunnel location was a mining claim and necessitated adverse proceedings

to protect its rights as against an applicant for a lode claim (see also Back v. Sierra Nevada Consol. Min. Co., 2 Idaho, 420, 17 Pac. 83), while the supreme court of Colorado, in Corning Tunnel Co. v. Pell, 4 Colo. 507, denied the right of a tunnel owner to adverse the application for a patent for a lode claim where the lode had not been discovered in the tunnel, and the discovery shaft was not on the line of the tunnel. Lindley, § 725, referring to the decision in Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co., 167 U. S. 108, 42 L. ed. 96, 17 Sup. Ct. Rep. 762, said:

"In the light of this decision and the one which it affirms, the rule may be thus formulated: Where a lode claimant applies for a patent to a location embracing a lode which has previously been discovered in the tunnel, the tunnel claimant will be compelled to adverse to protect his rights. A right in the particular lode inures to the tunnel proprietor immediately upon its discovery in the tunnel, which right is essentially adverse to the lode applicant; but where there has been no discovery in the tunnel, and it cannot be demonstrated that the lode will be cut by the tunnel bore, there is no necessity for an adverse claim."

Without further review of the conflicting authorities, it would seem that whatever may be the propriety or advantage of an adverse suit, one cannot be adjudged necessary when Congress has not specifically required it. Until the discovery of a lode or vein within the tunnel, its owner has only a possibility. He is like an explorer on the surface. Adverse proceedings are called for only when one mineral claimant contests the right of another mineral claimant.

If the defendant was not estopped by a failure to institute adverse proceedings, then the trial court erred in striking out the parts of the answer in reference to the date of plaintiff's discovery, and the judgment of the court of appeals was right.

This conclusion avoids the necessity of any inquiry as to the effect of the alleged estoppel, and the judgment of the Circuit Court of Appeals is affirmed.

CHAPTER VII.

AMENDED LOCATIONS—RELOCATIONS AND ANNUAL LABOR.

Relocation.

SWANSON v. SEARS.

224 U. S. 180, 32 Sup. Ct. 455. 1912.

MR. JUSTICE HOLMES. * * * The argument for the plaintiff is a vain attempt to reopen what has been established by the decisions. A location and discovery on land withdrawn *quoad hoc* from the public domain by a valid and subsisting mining claim is absolutely void for the purpose of founding a contradictory right. Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735, 1 Mor. Min. Rep. 510; Gwillim v. Donnellan, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110, 15 Mor. Min. Rep. 482. This doctrine was not qualified in its proper meaning by Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895, 19 Mor. Min. Rep. 370, for that case attributed effect to the overlapping location only for the purpose of securing extralateral rights on the dip of a vein the apex of which was within the second and outside of the first,—rights consistent with all those acquired by the first location. See Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co., 196 U. S. 337, 342, 49 L. ed. 501, 505, 25 Sup. Ct. Rep. 266. The principle of Belk v. Meagher was reaffirmed (171 U. S. 78, 79, 43 L. ed. 82, 18 Sup. Ct. Rep. 895, 19 Mor. Min. Rep. 370), as it was again in Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 226, 227, 48 L. ed. 944, 949, 950, 24 Sup. Ct. Rep. 632, and in Brown v. Gurney, 201 U. S. 184, 193, 50 L. ed. 717, 722, 26 Sup. Ct. Rep. 509. It is true that there is reasoning to the contrary in Lavagnino v. Uhlig, 198 U. S. 453, 49 L. ed. 1123, 25 Sup. Ct. Rep. 716, but in Farrell v. Lockhart, 210 U. S. 142, 146, 147, 52 L. ed. 994, 996, 997, 16 L. R. A. (N. S.) 162, 28 Sup. Ct. Rep. 681, that language was qualified and the older

precedents recognized as in full force. We deem it unnecessary to consider the distinctions attempted by the plaintiff between location and relocation, voidable and void claims, etc., as the very foundation of his right, his offer and permission of the United States under Rev. Stat. § 2322, U. S. Comp. Stat. 1901, p. 1425, was wanting when he did the acts intended to erect it. His entry was a trespass, his claim was void, and the defendant's forfeiture did him no good.

There was some attempt before us to recede from the concession made below, that the defendant had a right to relocate under Rev. Stat. § 2324, U. S. Comp. 1901, p. 1426. We do not see how it could help the plaintiff if the proposition were incorrect, or any sufficient reason for listening to the argument in this case.

Judgment affirmed.

CHAPTER X.

SPECIAL REMEDIES AND MISCELLANEOUS MATTERS.

Statute of Limitations—Measure of Damages.

LIGHTNER MINING CO. v. LANE.

161 Cal. 689, 120 Pac. 771. 1911.

SHAW, J. This is an action by the owner of a mine against the owners of an adjoining mine to recover the value of certain ore alleged to have been extracted by the defendants from the mine of the plaintiff.

The plaintiff claims the ownership of a mine known as the "Lightner mine." The defendants are the owners of the Utica mine, which adjoins the end line of the Lightner mine, and lies southeasterly of it. The vein is about 80 feet thick and extends from the southeast to the northwest through both claims. The ore was taken by the defendants at the depth of 525 feet below the surface by means of a shaft sunk on the Utica mine. From that shaft two crosscuts were made to the vein, one at a depth of 425 feet and the other at 525 feet, striking the vein about 288 feet from the division line between the two mines. Drifts were then run along the vein from each of these crosscuts to the division line. The upper drift is called the "No. 2 level"; the lower drift the "No. 3 level." The No. 3 level was extended some 42 feet over the line into the Lightner mine, and the No. 2 level some 13 feet over the line. More than 12,000 tons of the ore of the Lightner mine were then taken by the defendants and converted to their own use. The object of the action was to recover the value of this ore. * * *

The defendants claim that the action is barred by the statute of limitations, particularly by section 338 of the Code of Civil Procedure. The action was commenced on July 10, 1902. The jury found specially that the ore for which the recovery was allowed was removed from the plaintiff's mine by defendants prior to July 1, 1899. By subdivision 2 of section 338, in con-

nection with section 312, it is provided that "an action for trespass upon real property" is barred unless it is commenced within three years after the cause of action shall have accrued.

The plaintiff insists that an exception exists in cases where the trespass is fraudulently concealed by the perpetrator from the knowledge of the owner of the land, and that in such cases the period of limitation does not begin to run until the aggrieved party discovers the trespass, or with reasonable diligence might have discovered it. It is also contended that the case, as made by the pleadings and the findings of the jury, does not fall strictly within the class described in subdivision 2 of section 338, but that it is governed by subdivision 4, which reads as follows: "(4) An action for relief on the ground of fraud or mistake. The cause of action to such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." The plaintiff did not discover the trespass, nor did it have any reasonable means of making such discovery until June 1, 1901, when its own workings encountered the wrongful excavation of the defendants. It was the settled rule in actions at law that the plaintiff's mere ignorance of the existence of the injury complained of, or of the facts constituting such injury, or of the identity of the person liable therefor, until the period of limitation had passed, will not prevent the running of the statute. This rule has been followed in this state in several cases in which the point that there was fraud involved in the cause of action itself, or a fraudulent concealment thereof, was not raised or considered. Gale v. McDaniel, 72 Cal. 334, 13 Pac. 871; People v. Melone, 73 Cal. 574, 15 Pac. 294; Paige v. Carroll, 61 Cal. 211; Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115; Lambert v. McKenbie, 135 Cal. 100, 67 Pac. 6. In the last-mentioned case the court said: "It is not true that, where damages result from negligence, the cause of action arises upon the date of the discovery of the negligence, or of the negligent person. It is the date of the act and fact which fixes the time for the running of the statute. * * * And so throughout the law, *except in cases of fraud,* it is the time of the act, and not the time of the discovery, which sets the statute in motion." Italics ours.

But in actions at law, where the party liable had fraudulently concealed the injury, or the essential facts thereof, from the

party injured, there has been a great diversity of opinion on this question in the courts of this country and of England. (Here follow a discussion of the decisions on effect of fraud on running of Statute of Limitations, and quotation with approval of Bailey v. Glover, 88 U. S. 346.)

This decision has never been questioned. It was rendered in 1857. Although it has not been cited it has been followed in principle in subsequent cases. See Christensen v. Jessen, and other cases hereinafter cited. The statute then in force contained the provision now found in subdivision 4 of section 338 concerning actions for relief against fraud, but the decision was not based upon that provision, nor was it referred to. It was put upon the general ground that the rule was applicable to any statute of limitations, although not containing any express exception in relation to fraudulent concealment. The statutes of limitation have been re-enacted without change since the decision was made.

The familiar rule is that when there is a re-enactment of a statute in the same language, after a construction by the courts, the new statute is presumed to be intended to have the same effect as that previously given to its predecessor. From this review of the authorities, in this and other jurisdictions, and for the reasons given, we hold that the rule stated in Bailey v. Glover, supra, and Kane v. Cook, supra, is applicable in all cases where fraud enters into the cause of action, and there has been a fraudulent concealment of the injury. Further than this, we need not go in the present case. Under the decisions particularly applicable to underground trespasses in mines, there was here both fraud in the taking and a fraudulent concealment of the fact thereafter. "It is, indeed, part of the equity doctrine of fraud not to define it, not to lay down any rule as to the nature of it, lest the craft of man should find ways of committing fraud which might escape the limits of such a rule or definition." 1 Bouv. Dic. (Rawles Ed.) 844. It has been defined as "the unlawful appropriation of another's property by design." Oldham v. Stephens, 45 Kan. 369, 25 Pac. 863. Also as, "what is done in secret, and where there is concealment from a party in matter which concerns his interest." Dale v. Smith, 1 Del. Ch. 1. In Bulli C. M. Co. v. Osborne, supra, "the appellants, proceeding secretly with their workings," took coal from

under respondent's land, with knowledge, and intentionally. The court said: "In the present case the coal was taken furtively. No one can deny that it is a fraud to rob your neighbor furtively of his property." The court also declared that, to constitute a fraudulent concealment of such a trespass, it was not necessary to show that the wrongdoer had taken active measures to prevent detection. It is one of the cases where the fraud "conceals itself," as stated by Miller, J., in Bailey v. Glover, supra. In Livingstone v. Rawyards, L. R. 5 App. Cas. 34, Lord Hatherly also treats of an underground trespass as a species of fraud. In the English decisions the willful and secret taking of coal from a neighbor's mine is usually characterized as fraudulent. Hilton v. Woods, L. R. 4 Eq. Cas. 440; Dean v. Thwaite, 21 Beav. 623; Ecclesiastical Coms. v. North E. Ry. Co., L. R. 4, Ch. Div. 860; Trotter v. McLean, L. R. 13, Ch. Div. 586. Such an act, so committed, has all the substantial elements of fraud. Where one by misrepresentation induces another knowingly to part with his property, because his mind is so beclouded by the falsehood that he is unaware of the wrong done him, it is called a fraud. It is a taking of another's property without his knowledge of the fact that it is really taken from him. The ignorance in that case is produced by artifice. Where one betrays a trust and appropriates trust property to his own use, it is called a fraud. The injured party allows the other to have the possession and the opportunity to convert the property secretly, because of faith and confidence in the wrongdoer. In the case of underground mining of a neighbor's ore, nature has supplied the situation which gives the opportunity to the trespasser to take it secretly and causes the ignorance of the owner. Relying upon this ignorance, he takes an unfair advantage of his natural opportunities, and thereby clandestinely appropriates another's property while appearing to be making only a lawful use of his own. The act in its very nature constitutes the deceit which makes it a fraud. It is a daily false representation that the ore he is taking is his own, with full knowledge that it belongs to another, and that that other is deceived by the artifice.

The evidence is sufficient to show a fraudulent taking and fraudulent concealment of this character. * * *

The next question presented is that of the measure of damages. Twelve thousand tons of ore were taken from plaintiff's

mine by the defendants. From this, after milling it at their own expense, defendants obtained gold of the value of $54,000. The cost of mining and milling it was $27,000. The verdict and judgment was for $54,000. Defendants claim that the cost of mining and milling should have been deducted from the value of the gold obtained. Plaintiff's counsel concede the rule to be that, if the invasion of the mine by defendants was the result of honest mistake and inadvertence, the measure of damages would be the value of the gold less the cost of mining and milling, but they say that, if it was intentional and with knowledge of plaintiff's rights, the defendants are chargeable with the value of the gold after reduction, without any deduction for expenses of mining and milling. The authorities sustain the latter proposition. 4 Suth. on Dam. §§ 1126, 1127, 1128; 2 Sedg. on Dam. §§ 500-504. The objection of the defendants is that to allow damages in excess of the value of the ore as it lay in the mine is to give plaintiff the benefit of defendants' labor without any equivalent in return, and is, in effect, punitive damages, allowable only where there is oppression, fraud, or malice, and which will not be given against principals for the fraud of their agent, unless such fraud was known to the principals, or was authorized or ratified by them. The authorities last cited assume that such enhanced damages are punitive in character.

Under the rules laid down in the Civil Code, it must be conceded that the plaintiff can be allowed the benefit of defendants' work in mining and milling the ore only upon the theory that it is given as a punishment of the defendants. The general rule of damages in tort is declared to be "the amount which will compensate the injured party for all the detriment proximately caused thereby, whether it could have been anticipated or not." Section 3333. For the wrongful conversion of personal property, the damage allowed is its value "at the time of the conversion," with interest, or, if "the action has been prosecuted with reasonable diligence," the highest market value at any time between the conversion and the verdict, without interest, at plaintiff's option. Section 3336. Treating the case as one for the conversion of chattels, the conversion was complete when the defendants had mined the ore and mingled it with ore from their own mine. Its value at that time would not include the

cost of milling. No evidence was given as to the cost of mining alone. The subsequent "highest market value," referred to in the second clause of section 3336, ordinarily means the subsequent value of the thing in the condition it was in at the time of the conversion. It would not include a value added to it by reason of an improved condition given to it by the defendant after conversion. Of course, if the property taken can be identified in its changed condition, the rightful owner may retake it as it is, since the title remains in him, and he may thus in that case obtain the benefit of the improved condition. But in this case identification is impossible. It is not claimed that the unmilled ore was, or would have been, ever of any higher value than it was when it was mined. The giving to the plaintiff of the value added to it by the milling, as damages, is therefore not authorized by section 3336. It can be allowed only as exemplary damages, authorized by section 3294, as a punishment, where the defendants have been guilty of oppression, fraud or malice.

It is the settled law of this state that exemplary damages cannot be given against a principal for the fraud of the agent, unless the principal either had knowledge of the fraud at the time, or authorized it, directly or by implication, or ratified it after it came to his knowledge. In the recent case of Davis v. Hearst, 116 Pac. 530, under the subtitle "Imputed malice in fact," the rule is thus stated: "It follows of necessity that no principal can be held in punitive damages for the act of his agent, unless the particular act comes within the principal's specific directions or general suggestions, or unless the principal has subsequently ratified it, such ratification presupposing, it is said, original authorization." We also refer to the authorities there cited on this point.

We do not find in the evidence any substantial proof that the defendants had any knowledge of the trespass complained of, or of its fraudulent character, at the time of its occurrence, or that they either specifically or by general directions or suggestions authorized it. The management and supervision of the defendants' mining operations appear to have been committed to the defendant, C. D. Lane. Defendant Hayward was consulted, but he seldom visited the mine. Lane was in the mine in 1897 after the admitted trespass on level No. 2 occurred, and he

immediately noticed it and condemned it. He gave instructions to those in subordinate control that they must mark the boundaries in the levels, so that the men would know when they came to it, and that they must take care not to trespass again on the Lightner mine. There is no evidence that either of the defendants were ever informed of the trespass here in issue until this suit was begun against them. The defendant Hobart Estate Company owned a one-third interest in the Utica mine, but it took no part in the management and none of its officers ever visited the mine. Its only participation in the enterprise was the receipt of dividends from the other partners and the payment of expenses when called on to do so.

Plaintiff argues that the defendants ratified the wrongful and fraudulent acts of their agents by the denials thereof in their answer to the complaint, and their failure to investigate the matter or make restitution, after they were informed of the facts by the service upon them of a copy of the complaint. Where a party is sued, he has the legal right to make such defenses as he believes he can establish by proof. It is true, as we have said, that there is sufficient evidence to sustain the verdict of the jury holding that the ore in question was taken after November 21, 1896, when plaintiff first acquired an interest in the Lightner mine. But it must also be admitted that, although sufficient to raise a conflict, this evidence is not particularly strong or convincing, and that the defendants produced ample evidence to show their good faith in denying the trespass in issue and pleading the statute of limitations. The jury gave credit to the opposing testimony, but there is nothing in the case that would authorize the conclusion that the defendants alleged these defenses in bad faith, or that the pleading thereof should be taken as evidence of ratification of a fraudulent act which they obviously expected to prove had not been committed against the plaintiff at all. There may be some circumstances that would arouse a suspicion of knowledge on their part prior to the filing of their answer, but there was no substantial proof thereof. The service of the complaint in the former action in 1897, for the admitted trespass cannot serve as such proof, for the plaintiff's case rests entirely upon the theory that the ore in question here was taken subsequent to that date, and after the defendant Lane had given positive instructions to the men at the mine not to

trespass again. There is no proof of knowledge, authorization, or ratification.

The result is that the verdict for $54,000 is excessive. It should have been for only $27,000, which the jury found to be the value of the ore before mining and milling. * * *

Substantial justice demands that, instead of reversing the cause for a new trial, the plaintiff be at least given an opportunity to accept the part of the damages as to which the verdict is not vitiated by the errors aforesaid. See Salstrom v. Orleans, etc., Co., 153 Cal. 558, 96 Pac. 292. * * *

We concur: SLOSS, J.; ANGELLOTTI, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

On Rehearing, 1912.

PER CURIAM. The plaintiff having consented thereto in open court, it is ordered that the judgment appealed from be modified by the deduction of $27,000 therefrom, leaving the same to stand for the remaining $27,000 and costs of suit, such modified judgment to bear interest at the legal rate from the date of entry of said judgment, and the order denying a new trial be affirmed.

INDEX

Prepared by F. W. SCHENK
Librarian, Law School, University of Chicago

(The figures refer to those at the foot of the pages.)

Abandonment,
of unpatented mining locations, effect of, 468, 469.
of water rights, 370-373.
defined, 370.
analogy of, to the rule of diligence, 372.
burden of proof on party alleging, 372, 373.
effect of, 373.
implies some act of relinquishment, 370.
intention to abandon, what amounts to, 370, 371.
non-use,
may raise presumption of intent to abandon, 371, 372.
no presumption of intention to abandon if use of water is resumed, 372.
not abandonment, 371.
not presumption of abandonment, 371.

Absentees, administration of estates of, 145, 146.

Accounting,
by administrator or executor, 169, 182, 183.
by guardian of ward's property, 194, 195, 197.
ward may bring action for, 197.

Acknowledgment, of a will, by a testator, 61, 90, 100.

Actio Personalis Moritur Cum Persona, 158.

Ademption, 133-138.
defined, 133.
by fulfillment of a special purpose, 138.
of,
legacy for a special purpose, 137, 138.
portions, 133, 136, 137.
intention of testator governs, 136.
rules governing, 136.
satisfaction of devise or legacy by advancement, 136.
theory of, 137.
where relationship is of parent and child, 136, 137.

Ademption, of portions—*Continued*
where relationship is remote, 137.
specific legacies, 134-136.
illustrations, 134-136.
Administration. See also Administrator; Executor.
of estates, 142-183.
defined, 142.
action for personal injury of the deceased dies with the person, rule that, 158.
application for, 144, 147, 148.
by heirs or distributees, 144, 147.
hearing on, 147.
notice of, 147.
time for, prescribed by statute, 148.
assets of the estate, collection of, 155, 157, 158.
charges against testator's property, what are, 37-41.
chattels real go to administrator or executor, 156.
choses in action, whether assets, 158-160.
courts of probate supervise the, 2, 140, 141.
grant of,
a proceeding in rem, 148.
contest of, 147, 148.
letters of administration, 151.
letters testamentary, 151.
inventory and appraisal, 160, 161.
appraisers, number of, 160.
by statute, 160.
not conclusive either for or against the officer, 160, 161.
summary remedies for failure to make, 160.
supplementary inventory, 160.
jurisdiction of court in the, 145-148. See also Jurisdiction, of courts.
legislature may change laws governing the, after the testator's death, 48.
management of the estate, 165-171.
mortgage, interest of mortgagee goes to personal representative at mortgagee's death, 157.
necessary in each state where there are assets, 180.
of absentees, 145, 146.
of persons who perish in common disaster, 146.
personal property,
answerable for debts and legacies of deceased, 143, 168.
as assets, 157, 158.
sale of, by administrator, 168.
petition for, 144, 147, 148.
presumption of death, when, 146.
purpose of, 142.
real property of testator,
belongs to heirs, 155, 157.

Administration, of estates, real property of testator—*Continued*
may be sold for debts and legacies, 155, 157.
revoked ipso facto, 154.
Administrator. See also Administration, of estates; Executor.
defined, 142.
accounting by, 169, 182, 183.
actions,
against, 161, 162, 173.
by, 158-164.
for injuries to the personal estate, 158, 159, 163.
for personal injuries to testator, 158, 160, 162, 163.
on contracts of deceased, 159, 162, 163.
to collect assets, 161-164.
acts of,
before grant of letters of administration, 152-154.
rules governing, 143.
ancillary, 180.
an officer of the court, 143.
appointment of, 143, 144, 148-152.
evidenced by letters of administration, 151, 152.
preference, order of, 149, 150.
relates back to time of testator's death, 152.
who may claim appointment, 148-150.
bond of, 150, 151.
co-administrators, 178-180. See also Co-administrators.
compensation of, 182.
contracts of, 169.
creditor as, when, 149.
de bonis non, 181.
powers and duties of, 181.
deed of, 172.
discharge of, 182, 183.
duty of, 4, 155, 157, 158, 161-164, 172.
to administer the estate, 157, 161.
to bury the deceased, 173.
to collect and recover possession of assets, 155, 157, 158, 161-164.
to pay debts and legacies, 173-178.
executor distinguished from, 143, 144.
foreign representative of, 180, 181.
husband as, of estate of deceased wife, 148, 149.
inventory and appraisal by, 160, 161.
judgment against, 169.
jurisdiction of, 143.
leases of, 222, 223.
liability of, 161, 167, 171-178.
arising from,
acts of the deceased, 171, 172.
his own acts, 172, 173.

Administrator, liability of—*Continued*
extent of, 171-173.
for active wrongdoing, 172.
for contracts of decedent, 171.
for negligence, 172.
for payment of debts and legacies, 173-178.
for waste, mismanagement or breach of duty, 167.
not liable for loss sustained from a mistake of law, when, 161.
on causes of action arising since the death of deceased, 173.
on covenants,
implied by law, no liability, 172.
of deceased concerning real estate, 172.
management of the estate by, 165-171.
cannot ratify invalid transactions of testator, 171.
care, skill, and diligence of ordinary business man required, 165, 166.
entitled to possession of real estate during administration under statute, 155.
funds,
deposit of, in bank which afterwards fails, effect of, 165.
must be kept separate from officer's personal funds, 165.
must not be used by officer in his own business, 165.
good faith required, 165.
investments, 166.
of business of deceased, 166, 167.
payment of current expenses and demands, 166.
property of the estate, keeping of, 165.
settlement of partnership interest, 167.
under statutes, 165.
mortgage of real property by, 169.
next of kin as, 148, 149.
oath of, 150.
payment by,
of allowance for support of widow and minor children, 173.
of claims against estate, 174-176.
filing of, 174, 175.
of debts, 173-178.
appropriation of assets, order and priority of, 178.
due workmen, 174.
of expenses,
of administration, 173.
of funeral, 173, 174.
of last sickness, 174.
of judgment, 175.
of legacies, 173-178.
of rent, 174.
of specific legacies, 176, 177.
contribution from holders, when, 177.
priority under statute, 173, 174.

Administrator, payment by—*Continued*
time allowed for, 175.
personal property vests in, 168.
powers of, 4, 152.
qualifications of, 150, 151.
removal of, 154, 155.
renouncement by, effect of, 150.
resignation of, not permitted, 155.
sale of personal property by, 154, 156, 158, 168, 169.
license from court to sell, 156, 158.
purchaser at, title of, 154, 169.
when the will afterwards turns out to be spurious, 154.
sale of real property by, 169-171.
administrator cannot purchase at sale, 170, 171.
essential to valid sale that court has jurisdiction, 170.
power conferred by statute, 169, 170.
provisions of statute, 169, 170.
procedure, 169, 170.
title of, 152, 168.
wife as, of estate of her deceased husband, 148, 149.
will discovered after the grant of letters to, effect of, 154.
with will annexed, 142, 150, 181.
Advancement,
gift when not an, 136, 137.
satisfaction of devise or legacy by, 125, 136, 137.
Adverse Possession,
adverse user of water rights may acquire title, when, 373.
tenant by sufferance does not hold by, 209.
After-Acquired Property,
devise of, 41, 131.
under Illinois Statute of Wills, 41.
under modern Statute of Wills, 41, 131.
under old English Statute of Wills, 41.
lapsed devise considered as, under early common law, 130, 131.
Age, at which testator is considered as of capacity to make will, 54, 55.
Agent, lease of, 223, 224.
Agreement. See Contract.
Agricultural Fixtures,
defined, 267.
may be removed by tenant, 267.
Agriculture, rights in water for purposes of, 316, 323, 340.
Aliens,
as beneficiaries under a will, 13, 15, 55, 56.
holding of title to real property by, 56.
may acquire mining rights, when, 417.
wills of, 50, 51.
at common law, 50.
under modern statutes, 50, 51.

Alternative Wills, 46, 47.
defined, 46.
illustrations of, 47.
of different dates, 46, 47.
Ambiguitas Latens, defined, 85-87.
Ambiguitas Patens, defined, 85.
Ambiguities,
in the execution of a will, effect of, 83-87.
as to property misdescribed, 86, 87.
doctrine of falsa demonstratio non nocet applied, 86.
where beneficiary or legatee is misnamed, 87.
Amended Locations of Mining Claims, 461. See also Location, of a mining claim.
American Mining Law,
adoption of the district laws and customs which became known as, 403.
birth of the so-called, 394.
composed of, 398, 408, 409.
federal statutes, 408.
local rules and customs not inconsistent with federal, state or territorial legislation, 408.
state or territorial statutes not inconsistent with federal legislation, 408.
Anglo-Saxon Law, wills under, 32.
Animus Revocandi, 107, 109-112, 116.
Annual Labor. See also Location, of a mining claim.
requirements of, to be performed on unpatented mining locations, 462-468.
Annuities,
ademption of, 135, 136.
long, 135, 136.
short, 135, 136.
Apex,
of lode or vein of minerals, 437-440. See Veins, of minerals.
apex right,
explained, 439, 440.
granted by United States Revised Statutes, 440.
blind apex, defined and explained, 437.
dip right, explained, 439.
location of, 437, 438.
term not used in Federal Act of 1866, 437.
Appointment,
of administrators, 143, 144, 148-152. See also Administrator.
of guardians, 186, 190, 196. See also Guardian and Ward.
Appropriation,
of water founded on beneficial use, 317-320, 322, 340-354, 374.
abandonment, 370-373. See also Abandonment, of water rights.
appropriators. See Appropriators.
appurtenant to the land to be irrigated, 360.

Appropriation, of water, founded on beneficial use—*Continued*
Atchison v. Peterson, rule of, 325, 326.
beginnings of the law of, 324, 325, 346.
Act of Congress of 1866, amended in 1870, 325, 346.
decisions of the courts, 325, 346.
beginnings of the practice of, 323, 324, 346.
by common consent, 324, 346.
by informal legislation, 323, 324.
by riparian owners, 317-320. See also Riparian Rights.
capacity of appliances, 349.
complete, when, 348.
constitutions, provisions of state, in respect to, 327.
construction of ditches, an element in the, 343, 346.
conveyance of appropriation rights, 360, 361.
diversion. See also Diversion.
actual, a necessary element in, 343, 346.
changes of, effect of, on, 366-368.
followed by an application to some beneficial use, the test of, 322, 363.
doctrine of, 322-328.
does not segregate the waters in a stream, 363.
elements in, 343, 344.
extended equally to all pursuits, 340, 341.
extent of, 349.
"first in time, first in right," maxim applied to, 342, 354.
for,
agricultural purposes, 323, 340.
domestic purposes, 323, 340, 341.
irrigation, 323, 348. See also Irrigation.
manufacturing purposes, 323, 340.
mining, 340.
from,
flood waters, 332, 333.
lakes, 331, 332.
natural streams, 330.
ponds, 331, 332.
seepage waters, 336-338.
springs from which natural streams arise, 331.
tributaries of natural streams, 331.
underflow, 333, 334.
underground streams, 334, 335.
waste or diffused surface waters, 338, 339.
in arid parts of the United States, 326, 327, 356, 357.
initial steps of, 344-348.
intent on, to appropriate, 344, 345, 370.
duty of courts in respect to, 344, 345.
evidenced how, 344.
"physical demonstration of the intent to take," 348.

Appropriation, of water, intent on, to appropriate—*Continued*
standing alone has no efficacy, 344.
statutes requiring notice, 345, 346.
law of necessity, 322, 323.
ex necessitate rei, 322.
legislation,
cannot affect substantial rights, 346-348.
can regulate the use, 347.
locus of use, 324.
made,
by a series of acts, 342, 343.
possible by the separation of the use of water from the land through which it flows, 359.
non-use, 371, 372. See also Abandonment, of water rights.
not confined to lands on banks of the stream, 324.
perfected appropriation, elements necessary in, 343, 375.
physical acts necessary, 342, 343, 345, 346.
marking of location of waterworks, 345.
rights acquired by things done, 346.
"some open physical demonstration," 345.
statutes requiring notice, 345, 346.
physical application of water, an element in, 343.
preferences, 341.
constitutional provisions relative to domestic purposes, 341.
prescriptive rights in water distinguished from, 374.
presupposes dedication by federal government, 374.
priority of dates, 340, 342.
property right in the, consists of right to divert and use water, 362, 363.
public waters only are subject to appropriation, 329, 330.
relative economic values, 341, 342.
rights in the, 316, 317, 322, 328, 360, 361, 370-373. See also Water, rights in.
steps in, 343-349.
tests, 343, 344, 347, 348.
theory of, origin of, 327, 328.
conflict as to, 328.
developed in part from the riparian doctrine, 327.
there can be no discrimination of, 341, 342.
title in, 359-361, 375-384. See also Water, rights in, title in.
under acts of Congress of 1866 and 1870, 357, 358.
under Desert Land Act, 358, 359.
use, change of place and character of, 366, 367.
an incident to the right of property in appropriation, 366.
burden of proof on petitioner to show that there will be no diminution of water in the stream, 368.
greater acreage served, no test of right or injury, 368, 369.
limitations on the, 367.

Appropriation, of water, use—*Continued*
objection that there will be less return seepage water by, discussed, 368.
rule as to what constitutes injury by, 367.
volume allowed, 342.
water subject to appropriation, 329-339.
Appropriators,
of water for irrigation or beneficial use,
abandonment, 370-373. See also Abandonment, of water rights.
conveyance by, 360, 361.
diligence required of, 349-354. See also Diligence.
rights of,
may be changed or lost by estoppel, 374.
relative, 362.
Arid Lands,
title to land and water in, 356.
use of water in streams by settlers of, 357.
Assets,
of testator's estate,
choses in action, when, 158-160.
collection and possession of, 155, 157, 158, 161-164.
set off, right of creditor to, 163, 164.
Assignment,
of a lease, 214, 215, 218, 271, 272, 288, 293.
agreement not to sublet will not be broken by, 215, 259.
by lessee for years, 218.
forfeiture of lease by, when, 308.
landlord, right of, to make, 271, 272.
must be an actual transfer of tenant's interest, 215.
notice must be given tenant, 271.
rent payable to assignee, 293.
subletting distinguished from, 214, 215, 259, 288.
tenant's duty to pay rent to assignee, 271.
of a tenancy, 214, 215.
Attainder, forfeiture of property for, 13, 50.
Attestation,
of a will, 69, 72, 73, 96-104.
defined, 99, 100.
formalities of, 99.
Illinois statute on, 72, 73.
must be in the presence of the testator, 101-104.
presence, what amounts to, 102.
within testator's line of vision, rule of, 103, 104.
must follow the act itself, 100, 101.
under the Wills Act, 101.
operation, what is the necessary, of, 99.
witness, competency of, 69, 70, 73, 96-98. See also Witness, to a will.
Attornment, of tenant, 227, 228.

"Bairn's Part," defined, 35.
Bastards,
as beneficiaries under a will, 16, 40, 57, 58.
could not inherit property at common law, 16.
forfeiture of property for defect of blood, 13.
mother of a bastard is its natural guardian, 187.
subsequent marriage of parents legitimates, 16.
Beneficial Use, appropriation of water for, 317-320, 322, 340-354, 374.
Beneficiary,
of a will, 13, 15, 16, 40, 47, 55-58, 129.
alien as, 13, 15, 55, 56.
company as, 57.
corporation as a, 56, 57.
death of, before testator, effect of, 129.
foreign corporation as a, 57.
general rule as to who is a, 55.
exceptions to, 55-58.
illegitimate child as a, 16, 40, 57, 58.
municipal corporation as a, 57.
murderer of the testator cannot be a, 57.
rights of,
under a valid will become vested property rights at death of testator, 47.
when a former will is found after distribution of testator's estate, 141, 142.
under modern statutes, 55-58.
United States as, 57.
unlawful society cannot be a, 57.
who may take as, 55-58.
Bequests. See also Devise; Legacy.
defined, 27, 28.
Bibliography,
law of descent and distribution, wills and administration, guardian and ward, 198.
law of irrigation and water rights, 392.
law of landlord and tenant, 314.
law of mines and mining, 480.
Blood of First Purchaser, 9, 10.
Bonds,
of administrators and executors, 150, 151.
amount, 150.
form, 150, 151.
sureties, 151.
of guardians, 189, 190.
Burden of Proof,
in the establishment of extralateral right in veins of minerals, 451.
on party alleging abandonment of water rights, 372, 373.

Burden of Proof—*Continued*
on petitioner for diversion of appropriated waters to show that stream will suffer no diminution, 368.

California,
admitted to the Union in 1850, 400.
board of land commissioners of, 409.
discovery of gold in, by Marshall in 1848, 400.
early mining districts and mining customs of, 401-404.
land adjustment in, 409.
Canals,
construction of, 385, 386.
eminent domain, right of, in, 387, 388.
laterals, 386.
rule of relation back applied, 353, 386.
sizes vary, 385, 386.
distribution of water for irrigation by, 386.
liability of owners of, for leaks or breaks in, 388.
ownership and control of, 388-392.
Cancellation,
of a will, 61, 70, 74, 105, 111, 112.
words of cancellation must be written on will, where, 111, 112.
Canons of Descent, 3, 5, 8-13.
changed by statute, 3, 5, 12, 13.
derived from feudal law, 5.
set forth and explained, 5, 8-11.
Carriers, irrigation works owned and operated by corporations as quasi-public, 389, 390.
Chancery Courts, may appoint guardians, 186, 187.
Charities,
bequests to, 39.
upon winding up of a charity,
property escheats to sovereign or state, when, 14.
property goes to original donors according to Illinois rule, 14.
Chattels Real, go to the personal representative upon testator's death, 157.
Check, payment of rent by, 294.
Child's Part, defined, 35.
Choses in Action, action on, by administrator or executor, 158-160.
Civil Death, administration of estate of person sentenced to imprisonment for life, 146, 147.
Co-administrators, 178-180. See also Administrator.
authority of, 178, 179.
liability of, 179.
Coal Lands, 413, 421.
Codicil,
defined, 29.
republication of,
former codicils by, when, 126.

Codicil, republication of—*Continued*
will by, when, 124-126. See also Republication, of a will.
revival of will by, 127, 128.
revocation of a will by, 61, 70, 74, 105, 106. See also Revocation, of a will.
revocation of, must be express and independent, 111.
Co-executors, 178-180.
authority of,
are joint and entire, 178.
upon death of one, entire authority is in survivor, 179.
liability of, 179.
Colorado, statutory provisions relative to water rights, 378-381.
Common Law, original colonies of America inherited the, from England, 393.
Compensation,
of administrators and executors, 182.
of guardians, 196, 197.
Conditions,
defined, 238, 242.
construed as covenants, when, 246, 247.
courts do not favor, 246.
covenants distinguished from, 242, 251.
"covenant," use of the word may create a condition, 247.
creation of, 244, 245.
in leases, 232, 238, 242-249.
defined, 238, 242.
agreement not to assign, breach of, 246.
are binding on lessee and sublessee, 247, 248.
breach of,
at common law, 249.
effect of, 242, 243.
lessor, his heirs or assigns may avoid lease for, 248, 249.
condition precedent, 243, 244.
condition subsequent, 243-245.
construed as covenants, when, 246, 247.
creation of, 244, 245.
illegal, 245.
impossible, void, 245.
non-compliance with, does not make lease void, 249.
parties affected, 247, 248.
reëntry clause in, 244, 245.
valid, what are, 245, 246.
waiver of, 244.
words of restriction do not create, 245.
kinds of, 243, 244.
precedent, 40, 243, 244.
defined, 243.
examples of, 244.

Conditions, precedent—*Continued*
rule as to the postponement of the vesting of title upon, 40.
subsequent, 243.
defined, 243.
creation of, 244.
valid, 245, 246.
Congress, Acts of,
respecting mines and mining,
1807, 399.
1829, 399.
1846, 394, 399.
1847, 394, 399.
1850, 394.
1866, 395, 400, 405-407, 440-443.
1870, 395.
1872, 395, 407, 438, 443-444.
1877, 358, 359, 411. See also Desert Land Act of 1877.
1892, 453.
1897, 453.
Consanguinity, 14-16.
collateral, 14, 15.
defined, 14.
civil, canon and common law rule of, 15.
examples of, 14.
degrees of, 15.
lineal, 14, 15.
defined, 14.
civil, canon and common law rule of, 15.
examples of, 14.
Consideration, in leases, 232, 236, 237.
Constitution of United States, abolished attainder and corruption of the blood, 50.
Contract,
grubstake, 474, 475. See also Grubstake Contracts.
option, in mining, 475. See also Option Contracts.
to lease,
construed as a license, when, 230.
lease distinguished from, 229, 230.
to sell land. See Vendor and Purchaser.
Contribution,
from devisees of other property when specific devise is taken to pay debts, 177.
from holders of specific legacies, when, 177.
Conversion, change of property by executor under a will not, 156, 157.
Conveyance. See Deeds.
Corporation. See also Foreign Corporations; Municipal Corporations.
as beneficiary under a will, 56, 57.
as guardian, 188.

Corporation—*Continued*
lease of a, 224.
mining claim of a, 456.
Corruption of the Blood,
abolished by United States Constitution, 50.
forfeiture of property for, 13.
Covenants,
defined, 242, 251, 252.
breach of, effect of, 242, 253, 259, 260.
breach of condition distinguished from, 242, 253.
damages for, 253.
conditions,
construed as, when, 246, 247, 251.
distinguished from, 242, 251.
construction of, 252, 253.
covenant, use of the word, may create a condition, 247.
express, 238, 251, 254, 259, 260.
implied, 238, 251, 253-259, 279, 284, 285, 287.
defined, 251.
no liability of administrator or executor, when, 172
in deeds, 251.
need not be under seal, when, 251.
in leases, 232, 238, 242, 253-260.
defined, 238, 242.
breach of, effect of, 242, 253, 259, 260.
by landlord, 253-258.
against incumbrances, 255, 256.
for payment of taxes, 256.
for quiet enjoyment, 254, 255.
for repairs, 256, 257.
by tenant, 258-260.
breach of, effect of, 259, 260.
express covenants, 259, 260.
implied covenants, 258, 259, 279, 284, 285, 287.
not to assign or sublet, 258, 259.
not to commit waste, 258, 284, 285.
to cultivate the land properly, 258, 259.
to insure, 258, 259.
to make repairs and improvements, 258, 287.
to pay rent, 258, 293.
to pay taxes and assessments, 258.
to reside on premises, 258.
to surrender the premises in good condition, 258.
express, 238, 251, 254, 259, 260.
grant and demise construed, 251, 252.
implied, 238, 251, 253-259, 279, 284, 285, 287.
of deceased testator, liability of administrator or executor on, 172.
personal, 252.

Covenants, personal—*Continued*
defined, 252.
construction of, 252.
real, 252.
defined, 252.
running with the land, 252, 254, 255, 293.
covenant for quiet enjoyment, 254, 255.
covenant to pay rent, 293.
example of, 252.
technical words not required to create, 251.
Creditor,
as administrator of an estate, when, 149, 150.
heir, liability of, for ancestor's debts at common law, 12.
satisfaction of, out of estate of decedent, 1.
takes precedence over devisee or legatee, 171.
Criminals,
attainder, doctrine of,
abolished by the Constitution of United States, 50.
applied by early law, 50.
cannot be witnesses to a will, 97, 98.
corruption of the blood, 50.
abolished by the Constitution of United States, 50.
wills of, 50.
Crops,
letting of land on shares for purposes of raising, 209.
planted by tenant for life, personal representative entitled to, upon tenant's death, 286.
tenant has no right to, after expiration of his tenancy, when, 285, 286.
Curtesy, interest of husband in, cannot be barred by wife's will, 38.
Custom, recognition of, in respect to mines and mining, 401-404.

Damages, measure of, for ore wrongfully taken from another's mine, 479.
Dams,
construction of, 386, 387.
for irrigation purposes, 386, 387.
in running streams, 386.
Decedent's Estates,
administration of, 139-183. See also Administration, of estates; Administrator; Executor; Probate.
descent of real property, 3, 5-16. See also Descent.
distribution of, 17-25. See also Distribution.
Deed,
by administrator or executor, 172.
by guardian upon sale of ward's real estate, 194.
gift by, effect of, 60.
in form of a lease, 231.
lease distinguished from conveyance, 231.
takes effect upon delivery and acceptance, 59.

Delivery,
of lease, 232, 235, 239, 240.
intention of parties governs, 240.
necessity of, to complete execution, 232, 235, 239, 240.
Descent. See also Distribution, of personal property.
applies only to real property, 6, 7, 17.
of real property, 3, 5-16.
defined, 5.
bastard,
could not inherit at common law, 16.
when legitimated may inherit under statute, 16.
blood of first purchaser explained, 9, 10.
canons of descent, 3, 5, 8-13. See also Canons of Descent.
collateral, 14, 15. See also Consanguinity.
defined, 14.
civil, canon and common law rules of, 15.
example of, 14.
consanguinity, 14-16. See also Consanguinity.
from,
"last entitled," 12.
"last seized," 12, 13.
half-brothers or half-sisters could not inherit from one another at common law, 10.
heir, liability of, for ancestor's debts, 12.
history of the law of, 5.
husband could not be heir of his wife at common law, 16.
intestate's real property vests at once in the heirs by operation of law, 15.
lineal, 14, 15. See also Consanguinity.
defined, 14.
civil, canon and common law rules of, 15.
example of, 14.
person actually seized, 11, 12.
entry necessary, 12.
last seized, what meant by, 11, 12.
who last died actually seized, 11.
purchaser, one who takes by will a, 10.
that comes from the father descends according to father's line at common law, 11.
that comes from the mother descends according to mother's line at common law, 11.
under common law rules, 3, 5-16.
under statutes, 3, 16.
construction of, depends on common law rules, 3.
Illinois Statute, provisions of, 3, 19-23.
where son dies without issue, 8.
wife considered an heir of husband and may inherit his property under statutes, 16.

Desert Land Act of 1877, 358, 359, 411.
appropriation of waters under, 358, 359.
lands granted under, 411.
supplemented by act of 1891, 411.
Devastavit, defined, 167.
Devise,
defined, 27.
ademption of, 133. See also Ademption.
devisee. See also Beneficiary, of a will.
defined, 28.
right of, when will is found after distribution of real and personal property, 141, 142.
devisor, defined, 28.
lapsed, 129, 130.
considered as after-acquired property, 129, 130.
distinguished from void devise, 129.
Illinois Statute, provisions of, 132.
under modern statute, 131, 132.
revocation of, by conveyance, 133.
contract to sell land sufficient, 133.
specific, 177.
when taken to pay debts, devisee entitled to contribution from other devisees, 177.
to a class, 132.
upon death of one of the class, his share would go to surviving members belonging to the class, 132.
void, 129, 131.
distinguished from lapsed devise, 129.
Devisee, of a will. See Beneficiary, of a will.
Diligence,
of appropriator of water for irrigation or beneficial use, 349-354.
a question of fact, 350.
Conger v. Weaver, rule of, 353.
initial date of commencement of enterprise, 352.
lack of, effect of, 350.
necessity for, 349-354.
no statutory rule of, 350.
practical, required, 351.
reasonable time, what is, 350.
result of, 352-354.
rule of relation back, 352-354. See also Rule of Relation Back.
defined, 354.
theoretical, not required, 351.
to be adapted to actual condition of settler, 350-352.
Dip,
of vein of minerals, 438, 439.
determined how, 439.
is at right angles to the true strike, 438.

Dip, of vein of minerals—*Continued*
under Federal Act of 1872, 438.
right, explained, 439.
Discovery,
of minerals, 423-427, 453, 454.
essential to the validity of a mining location, 422, 424.
gives discoverers a preference usually, 423.
loss of, 425, 427.
nature of, required, 424.
of placer deposits, 453, 454.
defined, 454.
place of, 424, 425.
possession pending, 425, 426.
priority of, effect of, 424.
provisions of United States Revised Statutes respecting, 423.
time,
for completing, 427.
for making, 425.
shaft, 426, 427.
purpose of, 426, 427.
requirements of, 426, 427.
Distress,
for rent, 300-302.
at common law, 300-302.
by statute, 301, 302.
express contract to pay rent necessary, 301.
goods distrained may be sold after due notice, 302.
landlord must take reasonable care of goods distrained, 301, 302.
of property other than tenant's depends on whether it is being used by tenant, 301.
relation of landlord and tenant must exist to give right, 301.
right to distrain goods abolished in number of American states, 302.
Distribution. See also Descent, of real property.
of personal property, 6, 7, 17-25.
at common law, 6, 7, 23, 24.
administered in ecclesiastical courts, 6, 7.
administrator after payment of debts was entitled to balance of personal property, 23.
rules of, changed by statute, 24.
decrees of, 18.
distributee,
action by, 18, 19.
assignment of, effect of, 18.
debts due from, deducted from his share, 18.
if a, dies pending distribution his share is payable to his personal representatives, 18.
right of, to his share vests at death of intestate, 18.
in general, 17-19.

Distribution, of personal property—*Continued*
per capita, explained, 25.
persons entitled to take, 17.
per stirpes, explained, 25.
rule of representation among brothers and sisters, explained, 24, 25.
scheme of, in Illinois, 24.
Statutes of Distribution, 17-19.
and the common law, 23, 24.
in Illinois,
examined, 24, 25.
in full, 19-23.
provisions of, 17-19.
usually postponed until final settlement of the estate, 18.
of water for irrigation purposes, 381-384.
according to the order of their priorities, 381.
a matter of state and public concern, 382.
by,
community by-laws, agreements and common consent, 381.
division and state engineers, 382, 383.
mutual ditch companies, 390.
the administrative system, 381-384.
water commissioners, 382.
statutory method of, 382.
under the state police power, 381, 383, 384.
Ditches. See Canals; Mutual Ditch Companies.
Diversion,
of water for irrigation or beneficial use, 343, 346, 366-368.
actual, necessary element in the doctrine of appropriation, 343, 346.
by riparian owners, 317, 319, 320.
change from the first, right of appropriators to make, 366-368.
an incident in the right of property, 366.
burden of proof on petitioner to show no diminution of water, 368.
greater acreage served not a test of injury, 368, 369.
limitations on the right of, 367.
rule as to what constitutes an injury, 367.
rule that there can be no greater diversion either in time or quantity than there was at old point of diversion, 368.
excessive, not permitted, 348.
Divorce, does not of itself revoke a will previously made in favor of a wife, 122.
Doctrine of Reasonable Parts, 35.
Domestic Fixtures, may be removed by tenant, 267.
Domestic Purposes, appropriation of water for, 323, 340, 341.
Dower, interest of widow in, cannot be barred by husband's will, 38.

Easements,
lease of, 201.
tenant's right to, 283.

Education, grant of public lands to states for purposes of, 413.
Ejectment, Action of,
by landlord to recover possession of leased premises at expiration of lease, 313, 314.
by tenant against landlord or third persons, 280, 282.
Emblements, 285-287. See also Crops.
include grain and vegetables of all kinds, 285.
in the law of landlord and tenant, 285-287.
planted by tenant for life, personal representative entitled to, upon tenant's death, 286.
tenant has no right to, after the expiration of his tenancy, when, 285, 286.
Eminent Domain,
lease may be terminated by property being taken by, 310, 311.
no eviction where premises are taken by, 255.
right of,
granted by Bill of Rights and by state statutes, 388.
in construction of canals, ditches, reservoirs, 387, 388.
Entry,
of tenant in possession of leased premises, 216, 279.
on land for purposes of descent, what is necessary, 12.
Escheat,
in America, 13.
under feudal law, 13.
where charitable corporation breaks up, 14.
Estates. See also Tenancy.
at will, 200.
by sufferance, 200.
for years, 200, 203-206.
freehold, 200.
in fee simple, 202.
less than freehold, 200.
life,
by Illinois Statute, 3.
may not be subject to testamentary disposition, 40.
of a minor, 4. See also Guardian and Ward.
pur autre vie, devisable by will in writing under Statute of Frauds, 61.
tail, by Illinois Statute considered as life estates, 3.
Estoppel,
of tenant to deny landlord's title, 282, 283.
rights of appropriator of water rights may be changed or lost by, 374.
Estovers, tenant is entitled to, 285.
Eviction,
of tenant under a lease, 255, 281, 282.
action for damages, right of, by tenant, when, 282.
actual, defined, 255.
constructive,
examples of, 255.

Eviction, of tenant, constructive—*Continued*
waiver of, what amounts to, 255.
may be actual or constructive, 255, 281.
relieves tenant of rent, when, 299, 300.
tenant may elect to treat lease as terminated, 307.
trespass will not amount to, 281, 282.
under eminent domain proceedings, 255.
Exceptions,
in leases, 232, 238, 243, 249, 250.
"excepting and reserving" construed, 250.
exception of the whole of what has previously been leased makes lease void, 250.
reservations distinguished from, 238.
"reserving unto the lessor" construed as exception, when, 250.
Execution,
of lease, 232, 235, 239, 240.
delivery necessary to, 232, 235, 239, 240.
seal required, when, 239, 240.
signing, 239.
by agent, 239.
of will, 75-104.
acknowledgment by testator, 61, 90, 100.
ambiguities, 83-87. See also Ambiguities.
as a joke, or as a subterfuge or blind, renders will void, 104.
attestation, 69, 72, 73, 96-104. See also Attestation.
by fraud, 75-78. See also Fraud.
by mistake, 81-84. See also Mistake.
by undue influence, 75, 78-81. See also Undue Influence.
contents, 89.
form, 87-104. See also Form, of a will.
incorporation by reference, 89-96. See also Incorporation by Reference.
legislatures may prescribe regulations governing the, 42, 43.
signing, 87-89. See also Signature, to a will.
Executor. See also Administrator.
defined, 142.
accounting by, 169, 182, 183.
action against, 161, 162, 173.
action by,
for fraud and deceit, 160.
for injuries to personal estate, 158, 159, 162.
for personal injuries to testator, 158, 160, 162, 163.
on contracts, 159, 162, 163.
to collect assets, 161-164.
acts of,
before grant of letters testamentary, 152-154.
rules governing, 143.
where subsequently the will was declared void, 153, 154.

Executor—*Continued*
administrator distinguished from, 143, 144.
an officer of the court, 143.
appointment of, 143, 144, 151, 152.
evidenced by letters testamentary, 151, 152.
relates back to time of testator's death, 152.
bond of, 150, 151. See also Bonds.
co-executors, 178-180. See also Co-executors.
compensation of, 182.
contracts of, 169.
deed of, 172.
de son tort, 153.
liability of, 153.
discharge of, 182, 183.
duty of, 4, 155, 161-164.
to administer the estate, 157, 161.
to bury the deceased, 173.
to collect and recover possession of assets, 155, 157, 158, 161-164.
to pay debts and legacies, 173-178.
entitled to possession of real estate during administration, 155.
foreign representative of, 180, 181.
inventory and appraisal by, 160, 161.
judgment against, 169.
jurisdiction of, 143.
lease of, 222, 223.
liability of, 161, 167, 171-178.
arising from,
acts of the deceased, 171, 172.
from his own acts, 172, 173.
extent of, 171-173.
for,
active wrongdoing, 172.
contracts of decedent, 171.
negligence, 172.
payment of debts and legacies, 173-178.
waste, mismanagement or breach of duty, 167.
not liable for loss which has been sustained from mistake of law, when, 161.
management of estate by, 165-171.
cannot ratify invalid transactions of testator, 171.
care, skill and diligence of an ordinary business man required, 165, 166.
funds,
deposit of, in a bank which afterwards fails, effect of, 165.
must be kept separate from officer's personal funds, 165.
must not be used by officer in his own business, 165.
good faith required, 165.
investments, 166.

Executor, management of estate by—*Continued*
of business of deceased, 166, 167.
property of the estate, keeping of, 165.
settlement of partnership interest, 167.
under statutes, 165.
mortgage of real property by, 169.
oath of, 150.
payment by,
of allowance for support of widow and minor children, 173.
of claims against estate, 174-176.
filing of, before, 174, 175.
of debts, 173-178.
appropriation of assets, order and priority of, 178.
due workmen, 174.
of expenses,
of administration, 173.
of funeral, 173, 174.
of last sickness, 174.
of judgment, 175.
of legacies, 173-178.
of rent, 174.
of specific legacies, 176, 177.
contribution from holders, when, 177.
priority under statute, 173, 174.
time allowed for, 175.
powers of,
as conferred by the will, 156.
discretionary, 156.
qualifications of, 150, 151.
removal of, 154, 155.
resignation of, 154.
sale of personal property by, 168, 169.
license from court to sell, 156, 168.
purchaser at, title of, 154, 169.
when the will afterwards turns out to be spurious, 154.
sale of real property by, 169-171.
essential to valid sale that court have jurisdiction, 170.
executor cannot purchase at sale, 170, 171.
power conferred by statute, 169, 170.
provisions of statute, 169, 170.
procedure, 169, 170.
title of, 152, 168.
Extralateral Right, 407, 437-451.
defined, 439.
in mining claims,
apex right or dip right, explained, 439, 440. See also Apex; Veins.
burden of proof to establish, 451.
continuity and identity of vein necessary to establish, 451.

Extralateral Right, in mining claims—*Continued*
extent and direction of, depend upon position of apex, 440.
"intralimital" or "intraliminal" right distinguished from, 440.
on broad lodes, 449, 450.
on secondary vein, 447, 448.
placer locations do not possess, 440.
under the federal acts of 1866 and 1872, 407, 440-443.
where,
end line and side line are crossed by vein, 445.
end line only is crossed by vein terminating within the claim, 447.
end lines converge in the direction of the dip, 441, 443, 444.
end lines diverge in the direction of the dip, 444, 445.
parallel end lines are crossed by vein, 441, 443.
side line only is crossed by vein, 446.
side lines are crossed by vein, 446.

Falsa Demonstratio Non Nocet, doctrine of, applied, 86.
Federal Mining Act of 1866, 395, 400, 405-407, 440-443.
comment on, 405, 406.
crude and inadequate, 405.
list of states under, 397.
Placer Act of 1870 amended the, 405, 406.
provisions of, 405, 406.
superseded by Act of 1872, 405, 407.
supplemented by state and territorial legislation, 397.
Federal Mining Act of 1872, 395, 407, 408, 438, 443, 444.
amended and supplemented the Federal Mining Act of 1866, 407.
provisions of, 408.
supplemented in minor respects by Congress, 408.
the present law of mining, 407.
Fee Simple, devise of lands held in, under Statute of Wills, 34.
Feme Covert, will of, 35, 51-54, 123. See also Married Women.
Feudal System,
landlord under the, 199, 200.
lease for years under, 203.
wills of personal property under the, 35.
Fire, effect of, on payment of rent by tenant, 295, 296.
Fire Escapes,
defective or unsafe, liability of landlord for injuries from, 276, 277.
neglect to furnish, liability of landlord for injuries due to, 276, 277.
Fire Insurance, action by administrator or executor on contract of, 163.
"First in Time, First in Right," maxim applied, 342, 354, 361.
Fixtures,
defined, 261, 262, 278.
agreement of parties in respect to creating, 263.
agricultural, 267, 278.
annexation, character of, 263-265.

Fixtures—*Continued*
barn when not a fixture, 263.
creation of, by statute, 263.
description of premises in a lease carries use and enjoyment of, 261.
domestic, 267.
doors and windows as, 264.
engines and boilers installed in mills as, 264.
intention of parties in annexing chattels to land,
as affecting, 262, 263.
to be determined how, 262, 263.
landlord's right to, when, 265, 278.
machinery as, 264.
nursery stock as, 264.
parties, relation of, as determining what are, 265.
questions concerning, arising between,
grantor and grantee of land, 265.
heir and administrator or executor, 265.
landlord and tenant, 266-269, 278, 289, 290.
mortgagor and mortgagee, 265.
remainderman and one who has life interest, 265.
vendor and vendee, 265.
removal of,
by agreement, 268.
by statute, 267.
conditions of, 268, 269.
reasonable time,
allowed to a tenant at will after notice, 268.
a question of fact for the jury, 269.
what is, 268, 269.
tenant's right to, 268, 289, 290.
without serious damage, 264, 269.
rules for determining, 262, 263.
intention of parties as affecting, 262.
their application to the relation of landlord and tenant, 266-269.
rules of rented property in regard to, 261.
statues, when, 262, 263.
test of, 261, 262.
trade, 264, 266, 267. See also Trade Fixtures.
vases, when, 262, 263.
windmill, when not a fixture, 263.
Flood Waters, appropriation of, 332, 333.
Forcible Entry and Detainer, landlord is criminally liable for, when, 313.
Foreign Corporations, as beneficiaries under a will, 57.
Form,
of a will, 87-104. See also Execution, of will.
contents, 89.
must be in writing, 90.
must conform strictly to statute, 87, 90.

Franchises, may be leased, 201.
Fraud,
defined, 75, 76.
by guardian, liability for, 193.
"conceals itself," meaning of, as applied to mining, 480.
forms of, 75, 76.
in the execution of a will, 75-78.
false identity or character, 76.
illustrations, 75-78.
makes will voidable, 75.
where the deceiver is innocent, 77, 78.
illustrations, 77, 78.
question one of construction, 77.
Funeral Expenses, priority of, in administration of the estate of deceased, 173.

Gambling, lease of premises which are to be used for purposes of, invalid, 232.
Geology, genetic theories in respect to veins of minerals, 418.
Gift,
by deed, effect of, 60.
by ward to guardian presumed to be fraudulent, 197.
causa mortis, defined, 30.
donatio mortis causa, defined and explained, 30.
inter vivos, 30, 136, 137.
rules governing, 136, 137.
theory of, 137.
to a class, 132.
will distinguished from, 29, 30.
Grubstake Contracts, 474, 475.
defined, 474.
mining partnership distinguished from, 474, 475.
writing not required, 474.
Guardian and Ward, 184-198.
guardian,
defined, 185.
accounting by, 194, 195, 197. See also Accounting.
ad litem, defined, 198.
appointment of,
by,
infant himself, 187, 189.
parent, 187, 188.
the chancery court, 186, 187, 190.
the court, 189, 190.
governed by statute, 189.
jurisdiction, 190.
procedure, 189.

Guardian and Ward, guardian, appointment of, by—*Continued*
the orphans' court, 190.
the probate court, 186, 190.
the surrogates' court, 190.
for insane persons, 196.
for spendthrifts, 196.
privilege of infant in selecting, 189.
who should be appointed, 190, 191.
authority of,
derived from the law or the special appointment, 187.
termination of, 195, 196.
by death or marriage of ward, 195.
by ward reaching the age of majority, 196.
to bind the ward within the scope of his general powers, 197.
bond of, 189, 190.
by nature, 185.
chancery, 186.
compensation of, 196, 197.
corporation as, 188.
deeds by, upon sale of the real estate of his ward by order of the court, 194.
duties of, 191-194.
as to ward's person, 191, 192.
as to ward's property, 192-194.
for nurture, 185.
fraud of, liability for, 193.
in socage, 185, 186.
investments by, 193, 194.
leases of, 222.
lord chancellor as, 186.
married woman as, 195.
misconduct of, liability for, 193.
mother as, 191.
natural guardians, 196.
negligent acts of, liability for, 193.
next of kin as, 191.
parents as, 187, 190.
but not of property which comes to the child by gift, devise, etc., 187.
probate, 186.
relative as, 190.
removal of, 196.
rights of, 191.
sale of,
property by, for maintenance of ward, 192, 193.
real estate by order of court, 194.
special appointment of, when, 198.
testamentary, 186, 191.

Guardian and Ward, guardian—*Continued*
unauthorized acts of, responsibility for, 192.
guardianship,
defined, 184, 185.
at common law, 185, 186.
in the United States, 186, 187.
termination of, 195, 196.
under modern statutes, 186.
trust created by the relation of, 192, 198.
ward,
defined, 185.
custody of, 191.
death of, terminates guardianship, 195.
disaffirmance by, of guardian's acts, when, 197.
domicile of, 190, 191.
right of guardian to change, 191.
education of, 191.
election, right of, by ward, when, 197.
gift to guardian is presumed fraudulent, 197.
income and principal of, guardian's duty toward, 192.
maintenance of, 191-193.
sale of property for, 193.
marriage of, terminates guardianship as to ward's person, 195, 196.
may restrain guardian from committing waste, 197.
placing of, in charitable institution, when, 192.
protection of, 191.
rights and liabilities of, 197, 198.
seduction of female ward, guardian cannot bring action for, 191.
services of, guardian not entitled to, 191.

Heirs, living children not provided for in a will allowed to take as, when, 39.

Homestead,
Act of 1862, 410.
creation of, in public lands, 410, 411.
in non-irrigable land in Idaho, 411.
in semi-arid lands in western states, 411.
procedure for acquiring, 410.
soldiers and veterans of the war, additional tracts of, 411.
disposal of public land under the homestead laws, 357.
interest of widow and children in a, cannot be barred by testator's will, 38.

Husband and Wife. See also Curtesy; Dower.
husband,
as administrator of estate of his deceased wife, 148, 149.
lease by, of his wife's separate property for period which extends after his death, when valid, 221.
not considered as heir of wife at common law, 16.

Husband and Wife—*Continued*
interest of either husband or wife in community property cannot be barred by provisions of a will, 38.
wife,
as the administrator of the estate of her deceased husband, 148, 149.
at common law could not inherit husband's property, 16.
under statutes, may inherit husband's property, 16.

Ice,
lease of the right to cut and remove, 201.
liability of landlord for injuries received from, on sidewalk, 275, 276.
Illegitimate Children. See Bastards.
Incorporation by Reference,
in a will, 89-96.
advancements, 96.
by codicil, 94, 95.
where original will was improperly executed, 94.
exception to rule, 96.
of notes signed by testator in favor of beneficiary, 94, 95.
payment of debts and future legacies, 91, 92.
test, 92, 93.
to another but unattested document, 93-95.
dated after execution of will, 93.
dated before execution of will, 93-95.
to future acts, 89, 90.
"to such persons and in such proportion as shall appear from a paper which will be found with my will," 93.
"to such persons as shall be his partners in business at his death," 92.
"to such persons as shall be his servants," 92.
under modern type of statute, 92, 93.
under Statute of Frauds, 90-92.
will must refer to document as existing so that it may be identified, 94.
Incorporeal Hereditaments, rights in the diversion and use of water are, 363, 364, 366.
Indian Reservations, 412.
Infants,
guardians of. See Guardian and Ward.
leases of, 214, 219, 220, 292.
avoidance of, on the ground of infancy, 219.
liability of infant for rent, 292.
voidable, when, 219, 220.
wills of, 35, 68.
Injunction,
by landlord against tenant for nuisance, 260.
pendente lite, 478.
to restrain waste in mining cases, 478.

Insane Persons,
guardians of, 196. See also Guardian and Ward.
leases of, 220, 221.
wills of, 68.
Inspection and Survey, pending litigation of mining properties, 478, 479.
Insurance. See also Fire Insurance; Life Insurance.
covenants in leases for, 258, 259.
Interesse Termini,
defined, 213.
assignment of, 214.
Interest, allowed on unpaid rent, when, 302.
Intoxicating Liquors,
illegal sale of, on leased premises will forfeit lease, when, 308.
lease of premises for the illegal sale of, invalid, 232.
Intralimital Right,
defined, 440.
extralateral right distinguished from, 440.
Invitees, injuries to, liability of landlord for, 274.
Irrigation. See also Appropriation; Diversion; Distribution; Water; Waterworks.
defined, 323.
appropriation of water for. See also Appropriation, of water founded on beneficial use.
doctrine of, 322-328.
tests, 343, 344, 347, 348.
waters subject to appropriation, 329-340.
distribution of water for purposes of, 381-384. See also Distribution.
districts,
organization of, 391, 392.
considered as quasi-municipal, 391.
under special laws, 391.
water districts distinguished from, 391.
doctrine of riparian rights unsuited to arid climates, 320, 321.
rights in water for purposes of, 316.
use of water for, 317-320, 340-354, 374.
works,
early history of, 388, 389.
owned and operated by private corporations, 389-391.
as quasi-public carriers, 389, 390.
mutual ditch companies, 390, 391.

Joint and Mutual Will, 43-46.
defined, 44.
example of, 45, 46.
not favored by early English law, 45.
revocable during the joint lives by either party, 45.
Joint Will,
defined, 43, 44.

Joint Will—*Continued*
may be probated at the death of either party, 44.
which is not reciprocal, 44.
Judgment,
against a deceased person,
payment of, by executor or administrator, 175.
against administrator or executor, 169.
Jurisdiction,
of court in the administration of estates, 145-148.
death of person necessary to obtain, 146.
for the country or district in which the deceased was domiciled at the time of his death, 145.
what is essential to obtain, 145.
where intestate died abroad, 145.
where person is absent and unheard from for seven years, 145, 146.
which acts first in the matter, 145.

Kent, England, wills of real property in the borough of, 33.

Lakes, water of, subject to appropriation, when, 331, 332.
Landlord and Tenant. See also Estates; Lease; Tenancy.
fixtures, rules as to what are, between, 266-269, 278, 289, 290. See also Fixtures.
landlord,
action of ejectment by, to recover possession of leased premises at expiration of lease, 313, 314.
capacity of, 218-224.
duty of, 270, 276, 277, 280.
arises as a matter of common law, 270.
by statute to provide fire escapes, 276, 277.
governed by covenants, 270.
in general, 270.
with reference to putting tenant into possession, 280.
execution of lease by, 218, 219. See also Lease.
heir of an owner as, 218.
infant as, 219, 220.
in feudal England, 199, 200.
in modern times, 200.
liability of, 270, 272-277.
arises as a matter of common law, 270.
for injuries, 272-277.
caused by latent defects, 272.
due to dangerous or defective condition of property, 273, 274.
due to neglect to make repairs, 274.
from defective sidewalks, 275.
from fall of snow accumulated on house top, 276.
from neglect to furnish fire escapes, 276, 277.
from snow and ice on sidewalk, 275, 276.

Landlord and Tenant, landlord, liability of, for injuries—*Continued*
to guest or servant of tenant, 273.
to invitees, 274.
to tenants and subtenants, 272, 273.
to third persons, 273, 274.
to trespassers, 274.
while making repairs to property, 274.
governed by covenants, 270.
in general, 270.
reëntry by,
for breach of conditions in lease, 308.
upon termination of tenancy, 312, 313.
reversion of, 227.
right of, 270-272.
arises as a matter of common law, 270.
governed by covenants, 270.
in general, 270.
to,
action for damages against tenant for injury to premises, 270.
action for injury to reversion, 271.
action for permanent injury to property, 270, 271.
assign, or lease, 271, 272.
fixtures, 278.
protect his interest, 270.
rent, 272. See also Rent.
repair and improve property, when, 277, 278.
sell property, 271.
summary proceedings by, to recover possession of premises upon expiration of lease, 314.
law of, 199-314.
letting of,
land on shares for purposes of raising crops, 209.
lodgings, 209-211.
relation of, 199, 216-218, 291.
by conduct of the parties, 216.
by implication, 216, 217.
capacity of parties, 218-224.
created how, 216-218.
by conduct or lease, 216.
under an agreement to lease, 217.
under an invalid lease, 217.
creation of an estate for years gives rise to the, when, 200.
distinguished from relation of,
master and servant, 224, 225.
mortgagor and mortgagee, 227.
partners, 225, 226.
principal and agent, 226.
vendor and purchaser, 226, 227.

Landlord and Tenant, relation of—*Continued*
entry by tenant into possession necessary, 216.
exists, when, 202.
formal letting or leasing not necessary to create, 216.
founded on contract, 199, 216, 229.
governed by rules relating to contracts, 199, 216, 229.
possession of the premises alone not sufficient, 217.
rent, reservation of, whether necessary to establish the, 217, 218, 291.
tenant,
defined, 202.
assignment of lease by, 214, 215, 218, 271, 272, 288, 293. See also Assignment, of a lease.
attornment of, 227, 228.
cannot deny landlord's title, 282, 283, 307.
capacity of, 218-224.
duty of,
not to commit waste, 279, 284, 285, 287.
to deliver up entire premises to landlord upon termination of tenancy, 312.
to pay rent, 271, 272, 290. See also Rent.
to assignee of lease, 271, 272.
easements, right of, to, 283.
entitled to emblements, when, 285-287.
entitled to estovers at common law, 285.
estoppel of, to deny during term of lease landlord's title, 282, 283.
implied covenants of, 279, 284, 285, 287.
infant as, 219, 220.
injuries to, liability of landlord for, 272, 273.
injuries to third persons, liability of, for, 288, 289.
distinguished from landlord's liability, 289.
from dangerous animals, 289.
insane person as, 220, 221.
liability of, for,
breach of conditions in lease, 283, 284.
committing waste, 279, 284, 285. See also Waste.
injuries to third persons due to the unsafe condition of premises, 288, 289.
material injury, 283.
possession by, right of, 279-282.
at common law, 279.
covenant by landlord to put tenant into immediate possession, effect of, 280.
ejectment, right of, against landlord or against third persons, 280, 282.
entry, 216, 279.
injury to, 270, 280, 281.
in modern time, 279.
landlord, duty of, with reference to tenant's possession, 280.

Landlord and Tenant, tenant, possession by—*Continued*
where lease is for a term to commence in the future, 279, 280.
possession of, eviction from, 255, 281, 282.
actual, 255, 281.
constructive, 255, 281.
protection of, against nuisance, 281.
repairs by, duty of, 287, 288.
to keep buildings wind and water tight, 287.
to keep fences in good order, 287.
right of, to remove fixtures, 289, 290.
subletting by, 214, 215, 259, 280, 288. See also Subletting.
use and enjoyment of premises by, 283-287.
Land Patents, grant of public lands by, 413.
Last Will and Testament, 26, 89. See also Will.
Lease, 199, 201-207, 229-241.
defined, 199, 229.
acceptance of, 232, 240.
agreement to lease distinguished from, 229, 230.
"agrees to lease," construed, 230.
"agrees to let," construed, 230.
assignment of, 214, 215, 218, 271, 272, 288, 293. See also Assignment, of a lease.
landlord, right of, to make, 271, 272.
at will, 206, 207.
conditions in, 232, 238, 242-249. See also Conditions, in leases.
consideration in, 232, 236, 237.
natural love and affection as, 236.
payment of lump sum as, 236.
rent as, 236.
services as, 236.
contract between landlord and tenant usually called, 199.
contract to sell distinguished from, 231, 232.
conveyance,
distinguished from, 227, 231.
in form of a, 231.
covenants in, 232, 238, 242, 243, 253-260. See also Covenants, in leases.
creation of,
by contract, 216.
to commence,
at an impossible date, takes effect, when, 212, 213.
at once, 211.
"from" a certain day, construed, 211, 212, 303.
in the future, 211, 237.
"to" a certain day, construed, 212, 303.
date of, 212, 213, 232, 235.
impossible, 212, 213.

Lease, date of—*Continued*
year omitted, effect, 213.
delivery of, 232, 235, 239, 240. See also Delivery, of lease.
description of the parties and property, 232, 235, 236.
duration of, 211-215.
construed against lessor in favor of tenant, 212.
may depend upon construction of lease, 212.
exceptions in, 232, 238, 243, 249, 250. See also Exceptions, in leases.
execution of, 232, 235, 239, 240. See also Execution, of lease.
forfeiture of, 307, 308.
for breach of conditions, at the election of landlord, 307.
for failure to pay rent, 308.
for illegal sale of intoxicating liquors on premises, 308.
for subletting or assignment, when, 308.
reëntry by landlord for, 308.
where tenant denies landlord's title, 307.
form of, 241.
for term of years, 203-206.
at common law considered a chattel interest, 203.
by statute treated as real property, when, 203.
death of either party will not terminate, 305.
destruction of premises will not terminate, 306.
lease from year to year distinguished from, 205.
"term" defined, 204.
to commence in the future, 204, 237.
under feudal system, 203.
under the Statute of Frauds, when, 204.
"years," term defined, 203.
from month to month, 206, 213.
terminated by month's notice to quit, 213.
from year to year, 204-206, 237.
defined, 205.
abolished by statute in some states, 206.
created how, 205.
example of, 205.
grew up by judicial construction in connection with tenancies at will, 204.
lease for years distinguished from, 205.
not known to early common law, 204.
terminated only on notice to quit, 213.
"hereby lets," construed, 230.
illegal leases, what are, 232, 233.
intention to create,
relationship of landlord and tenant the important thing in the, 232.
reservation of rent as, 231.
invalid, 232, 233.
lessee,
defined, 199, 229.

Lease—*Continued*
lessor,
defined, 199, 229.
"lets," construed, 230.
license distinguished from, 230, 231.
of,
a corporation, 224.
a guardian, 222.
a married woman, 221, 222.
an administrator or executor, 222, 223.
of personal property, 222, 223.
of real property, 222, 223.
at common law, void, 222.
under modern statutes, valid, 222.
of tenancy for years, 222, 223.
considered as a lease of personal property, 223.
an agent, 223, 224.
for landlord, 223.
for tenant, 223.
in writing, authority of agent to be in writing, 223.
rules of the law of principal and agent apply to, 223.
signature to, how to be made, 223.
an infant, 219, 220.
an insane person, 220, 221.
farming implements, 201.
franchises, 201.
furniture in a house, 201, 212.
live stock, 201, 202.
machinery in a mill, 201.
mines, 475, 476.
oil and gas, 476, 477.
right of way, 201.
rights of common, 201.
right to cut ice, 201.
right to fish, 201.
trees and timber, 201.
watercourses, 201.
parol,
at common law, 233.
effects of, 233, 234.
in states where invalid, creates tenancy at will, 233.
under Statute of Limitations, 233.
valid under Statute of Frauds, when, 234, 235.
parties to, 232, 235.
perpetual, no such thing as a, 277.
property subject to, kinds of, 201.
property to be leased should be sufficiently described, 235, 236.
parol evidence not admissible to contradict written description, 236.

Lease—*Continued*
recording of, 240, 241.
reëntry by landlord,
for breach of conditions in, 308.
upon termination of, 312, 313.
rent, 217, 218, 232, 236. See also Rent.
defined, 217, 290.
fixed usually by terms of, 219.
requirements of a, 232-241.
reservations in, 232, 238, 243, 249, 250. See also Reservations, in leases.
Statute of Frauds, effect of, on, 234, 235, 240.
subletting by tenant under a, 214, 215, 259, 280, 288. See also Subletting.
termination of, 212, 303-311.
by,
custom, 303.
death of either party, when, 305.
destruction of premises, 306.
eminent domain proceedings, 310, 311.
eviction, 307.
foreclosure of mortgage, when, 306.
forfeiture, 307, 308.
merger of ownership of property in tenant, 308, 309.
sale of premises, when, 305, 306.
surrender, 309, 310.
for a fixed term, 303.
"from" a certain date, construed, 211, 212, 303.
of tenancy from year to year, or month to month, 304.
"to" a certain date, construed, 212, 303.
upon some external event, 303.
to hold during the joint will of tenant and landlord, 206, 207.
arises, when, 206, 207.
writing required,
by Statute of Frauds, 234, 235, 240.
letters between parties may constitute a lease, 241.
seal not required, 240.
Legacy,
defined, 28.
ademption of, 133-138. See also Ademption.
charged upon the land, when, 178.
for a special purpose, ademption of, 137, 138.
has no priority over devise, 171.
lapsed,
defined, 129.
disposition of, 130.
distinguished from void legacy, 129.
Illinois Statute on, provisions of, 132.

Legacy, lapsed—*Continued*
under modern statute, 131, 132.
where there is a clause disposing of residue of the property, 130.
legatee,
defined, 28.
required to refund, when, 177.
specific legacies,
ademption of, 134-136. See also Ademption.
contribution from holders of, when, 177.
to a class, 132.
upon death of one of the class, his share would go to the surviving members of the class, 132.
void,
defined, 129, 130.
disposition of, 130.
distinguished from lapsed legacy, 129.
where there is a clause disposing of residue of the property, 130.
Legatee, of a will. See Beneficiary, of a will.
Letters,
of administration, 151.
testamentary, 151.
License,
in the use of real property,
contract to lease construed as, when, 230.
example of, 230, 231.
lease distinguished from, 230, 231.
to mine, 475, 476.
Liens, for rent, 300.
Life Insurance,
beneficiary must be named in a particular way, 41.
testator cannot by will change beneficiary, 40, 41.
Location,
of a mining claim, 418-436, 468, 469.
defined, 422.
abandonment of, effect of, 468, 469.
amended locations, 461.
for the purpose of curing a defect in the original location notice, 461.
annual labor, on unpatented mining locations, 462-468.
assessment work, 462.
character of labor required, 464-466.
failure to perform, does not of itself result in forfeiture, 468.
group work, 466, 467.
how valued, 467.
must actually benefit and promote the development of claim, 464.
nature of and reason for, 462, 463.
proof of, 468.
provisions of federal statutes, 463.

Location, of mining claim, annual labor—*Continued*
roads and trails constructed for the benefit of claim, 464.
time for performance, 463, 464.
description of, 430.
discovery, 423-427. See also Discovery, of minerals.
excessive lode locations, 435, 436.
federal requirements, 422, 423.
forfeiture of, 468, 469.
abandonment distinguished from, 468, 469.
failure to perform annual labor does not result in a, 468.
to co-owners, 469.
ground open for, 433, 434.
must be free ground, 433.
must include some portion of the apex of the vein, 433.
junior locator, 433.
marking on the ground the, 430-433.
corners marked, how, 432, 433.
mandatory, 431.
nature of requirement, 432, 433.
object of, 431.
"persons of reasonable intelligence," rule of, applied, 431.
provisions of United States Revised Statutes respecting, 430.
purpose of, 431.
time for, California rule, 431, 432.
under state statutes, 432, 433.
on the dip of the lode, invalid, 434.
posting of notice of, and its contents, 428, 429.
notice liberally construed by courts, 428.
not required by federal statutes, 428.
required by some state statutes, 428, 429.
time for, 428, 429.
recording of notice of, 429.
by state statutes must be verified and sworn to, 429.
not required by federal statutes, 429.
relocation, 461, 462.
attempted before usual hours for beginning work, effect of, 464.
usually made by a third party, 462.
senior locator, 433.
title, nature of, acquired by location, 470.
Loco Parentis, instructor and teacher considered in, 184.
Lodes. See also Veins.
of minerals in mining claims, 407, 416-436, 449, 450.
defined, 418-420.
broad lodes, 449, 450.
location of, 418-436. See also Location, of a mining claim.
lode claims, 405, 406, 421, 422.
end lines of, 434.
patents for, 472.

Lodes, of minerals, lode claims—*Continued*
side end lines of, 435.
side lines of, 434, 435.
position of, determined by apex of the vein, 434.
under Federal Act of 1866, 407.
under Federal Act of 1872, 407, 408.
under United States Revised Statutes, 421.
Lodgings,
letting of, 209-211.
condition of lodgings untenantable, effect of, on action for unpaid rent, 210, 211.
lodger, defined, 210.
ordinarily does not give rise to relation of landlord and tenant, 210.

Machinery, as fixtures, 264.
Manufacturing Purposes, appropriation of water for, 323, 340.
Married Women,
as guardians, 195.
contracts of, 221, 222.
leases of, 221, 222.
real property of, at common law vested in their husbands, 221.
wills of, 35, 51-54, 123.
at common law, 51, 52, 123.
of personal property, 52.
of real property, 51, 52.
disabilities, 51-54.
common law rule in regard to, removed by statute, 53, 54.
husband's consent to, when, 53.
modern rule, 52-54.
revocation of, 123.
under,
modern statutes, 52-54, 123.
Statute of 7 Wm. IV & 1 Vict., 35, 68.
Master and Servant, landlord and tenant, relation of, distinguished from, 224, 225.
Maxims,
Actio personalis moritur cum persona, 158.
A thing is definite if it can be made definite, 237.
First in time, first in right, 342, 354, 361.
Sic utere tuo ut alienum non lædas, 348.
Merger, of ownership of leased premises in the tenant terminates lease, 308, 309.
Military Reservation, 412.
Mill Sites,
classes of, 460.
first class, 460.
provisions of United States Revised Statutes respecting, 460.
second class, 460.

Mines and Mining,
Acts of Congress respecting, 394, 399, 405, 438, 453. See also Congress, Acts of.
American Common Law of Mines, 403.
American Mining Law, 394, 398, 403, 408, 409.
apex of lode or vein, 437, 438. See also Apex; Lodes; Veins.
claims,
may be sold, transferred, leased, mortgaged, and inherited, 470.
patents, issuance of, for, 471-473.
taxation of, 470.
title to,
acquired by location, 470, 471.
acquired by patent, 470, 471.
classes of laws relating to, in the United States, 396.
customs, usages, and legislation in respect to, 401-404.
judicial and legislative recognition of, 403, 404.
by California in 1851, 403.
obsolete today, except in remote regions of Alaska, 404.
recognized and confirmed by Federal Act of 1866, 405.
dip, 438, 439. See also Dip.
discovery, 423-427. See also Discovery.
extralateral right, 407, 437-450. See also Extralateral Right.
federal legislation affecting, 405-413.
Federal Mining Act of 1866, 395, 400, 405, 406.
Federal Mining Act of 1872, 395, 407, 408, 438.
grubstake contracts, 474, 475. See also Grubstake Contracts.
Hicks v. Bell, doctrine of, 400, 401.
history of the origin and growth of mining law in the United States, 393-404.
first period to 1848, 398-400.
historical outline, 393-396.
second period, 1848–1866, 400-404.
"intralimital" or "intraliminal" right, 440.
law of, 393-480.
lead and copper mines in the Middle West prior to 1828, 394.
leases of mines, 399, 475, 476.
legislation by the Continental Congress, 398.
legislation by the owners in respect to, 395, 401, 402.
licenses to mine, 475, 476.
location of mining claims, 418-436, 468, 469. See also Location, of a mining claim.
lodes, 407, 416-436, 449, 450. See also Lodes; Veins.
Mexican law of, in force in the western part of the United States before acquisition by United States, 394, 395.
mill sites, 460. See also Mill Sites.
mineral lands,
division of, 416.
non-mineral lands and, contrasted, 415, 416.

Mines and Mining, mineral lands—*Continued*
terms used in the statutes relating to, 414, 415.
who may acquire rights to, 414-417.
minerals,
defined, 414, 415.
non-metallic substances held to be, list of, 416.
substances which are considered as, 416.
tests of mineral character, 415, 416.
mining districts, 401-403.
analogous to the New England town meeting, 403.
organization of, and nature of regulations, 402, 403.
mining partnerships, 477.
mining rights,
aliens may acquire, when, 417.
citizens may acquire, 417.
corporation may acquire, 417, 456.
necessity for mining legislation arose, when, 394.
non-metallic minerals occurring in lode form, 422.
opening of a new mine as waste at common law, 285.
option contracts, 475.
ordinance of May 20, 1785, respecting, 398.
ore wrongfully taken from another's mine, measure of damages for, 479.
deductions allowed defendant for mining and milling, 479.
Statute of Limitations begins to run, when, 480.
patents,
defined, 471.
application for, 472.
adverse claim, filing of, 472, 473.
notice, 472.
protest, filing of, 473.
issuance of certificate of purchase or entry, 472.
of lode or placer claims, 471.
placer deposits, 396, 406-408, 452-458. See also Placer Deposits.
procedure for obtaining, 471-473.
quartz and lode claims, patent title to, 405.
regalian doctrine, 393.
rights in water for mining purposes, 316, 340.
rules governing the operation of mines and quarries came over with the common law from England, 393.
strike, 438, 439. See also Strike.
tunnel rights, 458, 459. See also Tunnel Rights.
veins, 407, 418-420, 447, 448. See also Veins, of minerals.
Minor Estates. See Guardian and Ward.
Mistake,
in execution of a will, effect of, 81-84.
as to matters other than the contents of the will, 84.
as to the contents of the will, 82-84.

Mistake, in execution of a will, effect of—*Continued*
evidence, admissibility of, 83.
kinds of, 82.
of fact in revocation of will, effect of, 113, 114, 116-119.
of intention in revocation of will, effect of, 114-116.
of law in revocation of will, effect of, 113, 114, 116-119.
Mortgage,
foreclosure of, may terminate lease, 306.
interest of mortgagee in mortgaged real estate goes to personal representative at mortgagee's death, 157.
mortgagor and mortgagee, relation of, distinguished from relation of landlord and tenant, 227.
Municipal Corporations, as beneficiaries under a will, 57.
Murderer, cannot by descent take property of an intestate whom he murdered, 15.
Mutual Ditch Companies,
appropriations of water acquired by, held as trustees for stockholders, 390, 391.
distribution of water according to the stock held by stockholders, 390.
irrigation works owned and operated by, 390, 391.
organization of, 390.
Mutual Will, 43-45. See also Joint Will; Joint and Mutual Will.
may be reciprocal, 44, 45.

National Forests and Parks, 412.
Natural Streams,
tributaries of, defined, 331.
water of, subject to appropriation for beneficial use, 330.
Navigation, public rights in water for, 315.
Next of Kin,
as administrator, 148.
as guardian, 191.
Non-Navigable Streams, ownership of bed of, 318.
Notice, statutory requirement of, in the appropriation of water for beneficial use, 345, 346.
Nuisance,
injunction by landlord against tenant for, 260.
maintained by landlord relieves tenant from rent, when, 299, 300.
Nuncupative Wills,
defined, 28.
apply to personal property only, 49.
prevention of fraudulent practice in setting up, 61, 62.
provisions of Statute of Frauds relating to, 62.
Nursery Stock, as trade fixtures, 264.

Obliteration, revocation of will by, 61, 70, 74, 105, 107-109, 118, 119.
Oil and Gas, leases, 476, 477.

Option Contracts,
in mining, 475.
must be in writing, 475.
working bonds, 475.
Ordinary's Courts, 186.
Orphans' Courts, 186, 190.

Parent and Child,
loco parentis,
defined and explained, 184.
instructor and teacher considered in, 184.
Parliaments, of Tinners of Devon and Cornwall, 395.
Partnership,
dissolution of, by death of partner, 167.
landlord and tenant, relation of, distinguished from, 225, 226.
mining, 477.
death or bankruptcy of partner does not terminate, 477.
differs from ordinary partnership, how, 477.
settlement of interest of deceased partner by administrator or executor, 167.
Patent, of mining claims, 471-473. See also Mines and Mining, patents.
Percolation,
defined, 335, 336.
percolating waters part of the soil, 336.
seepage waters distinguished from, 337.
underflow distinguished from, 336.
Perpetuities, Rule Against, wills, when in conflict with, 4, 40.
Personal Estates. See Personal Property.
Personal Injuries,
liability of landlord for, 272-277, 289.
to,
invitees, 274.
servants of tenants, 273.
tenants, 272, 273.
third persons, 273, 274.
trespassers, 274.
liability of tenant for, to third persons, 288, 289.
Personal Property,
defined, 64.
lease of, 201, 202.
in the nature of a bailment, 201.
of testator liable for debts and legacies, 157, 158.
wills of, 35, 36.
Placer Deposits, 396, 406-408, 452-458.
of minerals,
asphalt, borax, fine grades of clay, gypsum, marble, nitrate, petroleum, roofing slate, soda, and tailings considered as, 452.

Placer Deposits, of minerals—*Continued*
association placers, 456.
claims of, amount of, 456.
character of, 452, 453.
claims,
location of, 454-458.
excessive locations, effect of, 458.
marking of, on the ground, 454-456.
notice of, 457.
provisions of United States Revised Statutes concerning, 454, 455, 457.
requirements for, 453.
state legislation respecting, 456.
patents to, 471, 472.
discovery of, 453, 454. See also Discovery, of minerals.
discovery work seldom required in any of the states, 457.
dummy locators, 456, 457.
federal acts of 1892 and 1897 respecting, 453.
Federal Placer Act of 1870, 396, 406, 407, 452.
Police Power, of the state, distribution of water for irrigation under the, 381, 383, 384.
Ponds, water of, subject to appropriation, when, 331, 332.
Posthumous Children, rights of, under a will which does not make provisions for them, 39.
Prescription,
acquisition of rights in water by, 373, 374.
appropriation of water distinguished from, 374.
does not run against the government, 374.
presupposes a grant, 374.
Presumption of Law, revocation of will of testator by, 120.
Principal and Agent. See also Agent, lease of.
landlord and tenant, relation of, distinguished from that of, 226.
Probate. See also Administration, of estates; Administrator; Executor; Will.
defined, 139.
courts of, 2.
appeal from, 140.
appointment of guardians by, 186, 190.
decree of, effect of, 140.
exclusive jurisdiction of, 140, 141.
in common form, defined, 139, 140.
in solemn form, defined, 140.
proof in solemn form required, when, 139, 140.
in the English ecclesiastical courts, 139.
in the United States, 140.
of wills, 2, 3, 139-142.
per testes, 139.
petition to revoke, 140.

Probate—*Continued*
proceedings in, 140.
proof of will required in, 140.
statutory methods of, 140.
technical features of, 140.
Promissory Note, payment of rent by, 294.
Property,
rights in, among primitive people, 31.
rights in water acquired by appropriation are, 361.
Prostitution, lease of premises to be used for immoral purposes, invalid, 232.
Public Lands,
coal lands, grant of, 413.
Desert Land Act of 1877, grants of, under, 411.
federal government acquired no, in original states, 396.
federal legislation affecting, 357, 358, 360, 405-413.
grants of,
to states for educational purposes, 413.
homestead, creation of, in, 410, 411. See also Homestead.
Indian and military reservations, 412.
national forest and parks, 412.
patents, 413.
preëmption, 410.
railroad grants of, in aid of construction, 412.
sale of, at auction, 410.
scrip,
defined, 412.
Valentine, Sioux Half Breed, Forest Reserve Lieu Scrip, 412.
supervision and disposition of, are committed to the Department of the Interior, 471.
system of the, in the United States, 409.
Timber and Stone Act of 1878, grants of, under, 411.
titles in,
originally in the United States, by the Constitution, 356-358.
town sites in, 412.

Quiet Enjoyment,
covenant for, 254, 255.
runs with the land, 254.

Railroads,
by statute may lease franchises and right of way, 201.
grants to, by Congress, 412.
Real Estate. See Real Property.
Real Property,
defined by Statute of 7 Wm. IV and 1 Vict., 64.
grants by sovereigns of, in the United States, 409, 410.
land tenure in the United States, 409.
lease of, 199-314. See also Landlord and Tenant; Lease.

Records, recording of lease, 240, 241.
Relocation, of mining claims, 461, 462. See also Location, of a mining claim.
Rent,
defined, 217, 290.
actions for, 302.
interest allowed on unpaid rent in some states, 302.
set-off, 302.
amount of,
change in, 296, 297.
by agreement, 296.
if premises are used for sale of intoxicating liquors, 296, 297.
landlord cannot increase, 296.
tenant cannot insist on decrease, 296.
generally fixed by the terms of the lease, 291.
reasonable worth, 291.
as consideration for a lease, 232, 236.
covenants in leases for, 258.
destruction of premises will not relieve lessee from, when, 258, 259, 306.
distress for, 300, 302. See also Distress, for rent.
failure to pay, will forfeit lease, 308.
implied covenant of tenant to pay, 279.
infant, liable for, when, 292.
landlord, right of, to, 272.
liens for, 272, 300. See also Distress, for rent.
money as, in modern times, 218, 290.
out of the profits of the land, 290.
payment of,
by administrator or executor, 174.
by check, 294.
in advance, 294-296.
in cash, 291, 294.
in crops, 291.
in services, 218, 291.
tenant's duty in the, 291, 292, 297-300.
time of, 294.
to,
agent of landlord, 293.
assignee, upon assignment by landlord, 293.
heirs upon death of landlord, 294.
landlord, 293.
partners, 293.
personal representatives upon landlord's death, 294.
purchaser of leased property, 293, 295.
relation of landlord and tenant may exist without reservation of, 291.
reservation of, in a lease, 217, 218.
third persons, liability of, for, when, 292.
upon assignment of lease, 292, 293.

Rent—*Continued*
upon subletting of premises, 292.
where lease is made to two or more persons, 292.
Republication,
of codicil, by codicil, when, 126.
of will, 49, 59, 124-126.
by capacitated person, of will made during incapacity, 49.
by codicil, when, 124-126.
illustrations, 125, 126.
under modern statutes, 124.
under Statute of Frauds, 124.
Reservations,
in leases, 232, 238, 243, 249, 250.
arise, when, 243, 250.
by parol, when, 250.
"excepting and reserving," construed, 250.
exceptions distinguished from, 238.
in favor of lessor, 250.
"reserving unto the lessor," construed as excepting, when, 250.
Reservoirs,
construction of,
eminent domain, right of, in, 387, 388.
for the irrigation of lands, 386.
liability of owners of, for break or leak in, 388.
purposes of, 386.
Return Waters, 336-338. See also Seepage Waters.
subject to appropriation, when, 337.
Reversion, of landlord, 227.
Revival,
of a will, 59, 126-128.
by cancellation of second will, when, 128.
by codicil, 127, 128.
when codicil was afterwards destroyed, 127, 128.
by second codicil after will had been destroyed by first codicil, 127.
early English view, 126, 127.
illustrations, 127.
of parts of a will, 59.
Revocation,
of a will, 59, 105-123.
animus revocandi, 107, 109-112, 116.
must continue until the act of destruction is complete, 109.
by,
act of testator, 59, 105-112.
another will, 105-107.
example, 106, 107.
intention of testator to be ascertained, 106.
new will must expressly revoke old one, 106.

Revocation, of a will by—*Continued*
burning, 61, 70, 74, 105, 109.
cancellation, 61, 70, 74, 105, 111, 112.
circumstances, 119-123.
codicil, 61, 70, 74, 105, 106, 111.
contract to sell devised land, 133.
conveyance of devised land, 133.
destruction, 61, 70, 74, 105, 107-111.
defined, 107.
animus revocandi, 107, 109.
intention of testator, 107.
what constitutes destruction, 109-111.
marriage under Statute of 7 Wm. IV & 1 Vict., 70.
mistake, 113-119.
of fact, 113, 114, 116-119.
of intention, 114-116.
of law, 113, 114, 116-119.
obliteration, 61, 71, 74, 105, 107-109, 118, 119.
animus revocandi, 107, 109, 118, 119.
example, 108, 109.
statutes, provisions of, relating to, 71, 107.
where the effect is to change the devise, 108.
parol prior to the Statute of Frauds, 105.
presumption of law, 120.
subsequent instrument, 105-107.
tearing, 61, 70, 74, 105, 107, 109, 110.
animus revocandi, 107, 109.
intention of testator, 107.
when no revocation, 109, 110.
total change in the situation of the testator's family, 120-123.
at common law, 120, 121, 123.
by birth of children by subsequent marriage, 121.
by subsequent marriage, 121.
divorce not considered as a change, 122.
Illinois Statute, provisions of, 122.
illustrations, 120, 121.
dependent relative, 112-119.
where in a court of equity, a revocation will be disregarded because induced solely by a reason which failed, 113, 116-119.
illustrations, 116-119.
where the revocation is expressly conditioned by words in the revoking instrument, 113, 114.
illustration, 113, 114.
where the revocation is expressly conditioned not in words but by interpretation, 113-116.
a question of fact for the jury, 116.
illustration, 116.
implied, 119-123.

Revocation, of a will—*Continued*
joint and mutual will, 45.
joint will, 44.
mutual will, 44, 45.
of a woman by marriage at common law, 123.
of personal property under modern statutes, 105.
of personal property under Statute of Frauds, 105.
by an unattested writing, 105.
by parol, how, 105.
of real property,
under modern statutes, 105.
under Statute of Frauds, 105.
Statute of Frauds, provisions of, relating to, 61, 105.
to be in writing, 61.
Right, defined, 361.
Riparian Rights,
defined, 317.
are ex jure naturæ, 317.
beneficial use of stream, 317-320.
an incident to the ownership of the soil, 319.
artificial wants, 319.
by upper riparian owner, 319.
"common use," 318.
domestic use, 319.
for manufacturing purposes, 319.
irrigation rights, whether, 319.
natural wants, 319.
of riparian owners, 317-320.
"reasonable use," rule of, 319, 320.
returning water to the stream, rule of, 318.
conveyance of, 360.
depend upon the original conveyance of land with its appurtenances, 359.
diversion of water, rights of riparian owners, 317, 319, 320.
use which will not interfere with the requirements of lower proprietors, 320.
doctrine of, unsuited to arid climates, 320, 321.
illustration of, 316.
introductory, 315-321.
riparian owners,
ownership of, in the bed of non-navigable streams, 318.
rights of
are appurtenant to the land, 360.
to beneficial use of water, 317, 318.
severance of water rights appurtenant, when, 360.
Rock in Place,
necessary to make a vein or lode within the statutes, 420, 421.
wash or slide distinguished from, 421.

Rule of Relation Back,
defined, 354.
applied in the construction of,
canals, 353.
waterworks, 352.
based on a fiction of law, 354.
Conger v. Weaver, rule of, 353.
doctrine peculiar to law of irrigation, 354.
operation of, 352.

Sailors, wills of, 29, 63.
Sales, of the personal property of a deceased person by administrator or executor, 154, 156, 158, 168, 169.
Scrip, Valentine, Sioux Half Breed, Forest Reserve Lieu Scrip, 412.
Seduction, of female ward, guardian cannot maintain action for, 191.
Seepage Waters, 336-338.
damages caused by, 338.
in a limited way subject to appropriation, 337.
not subject to appropriation as against the owner of the land, 337.
on private lands, 338.
percolating waters distinguished from, 337.
underflow distinguished from, 337.
Set-Off,
against landlord in actions against tenant for unpaid rent, 302.
by creditor against estate of a deceased person, 163, 164.
by mortgagee against estate of deceased person, 164, note.
Shelley's Case, Rule in, wills in conflict with, when, 4.
Sic Utere Tuo Ut Alienum Non Lædas, applied to excessive diversion of water, 348.
Sidewalk,
defective, injuries from, liability for, 275.
snow and ice on, injuries from, liability for, 275, 276.
Signature,
by,
blot, 88.
mark, 88.
in,
ink, 88.
pencil, 88.
intention to make, necessary, 88.
to a will, 87-89.
defined, 88.
at foot of will, 88, 110.
depends upon provision of statute, 88, 89.
illustrations, 89.
by person other than the testator at testator's express direction, 88.
by testator, 87, 88, 90.
in presence of witnesses, 90.

Signature, to a will—*Continued*
required by,
Statute of Frauds, 87.
Statute of Wills, 87.
unnecessary, when, 110.
Soldiers, wills of, 29, 63, 69.
Sovereign, reversion of property to, upon death of owner, 1.
Spendthrifts, guardians of, 196. See also Guardian and Ward.
Springs, water of natural, from which a natural stream flows subject to appropriation, 331.
Statute De Donis, A. D. 1285,
effect of,
on wills, 33.
Statute of Distribution, 17-19.
administrator, duty of, under, 17.
and the common law, 23, 24.
in Illinois,
examined, 24, 25.
in full, 19-23.
provisions of, 17-19.
Statute of Frauds,
incorporation by reference in a will, effect of, under the, 90-92.
leases required to be in writing under, when, 234, 235.
parol leases valid under the, when, 234, 235.
provisions of, in relation to wills, 60-63, 105.
short term leases under the, 234, 235.
wills of real property required to be witnessed by credible witnesses under the, 90.
Statute of Limitations, begins to run against trespasser who wrongfully takes ore from another's mine, when, 480.
Statute of Mortmain, corporations could not take real property by devise under the, 56.
Statute of Uses,
devise to,
grantor's own use, effect of, under, 34.
use of third person, effect of, under, 34.
effect of, on wills, 34.
passed in 1535, 33.
provisions of, 34.
trust to defeat the provisions of, 34.
Statute of Wills, 34-36.
act to interpret the, 34.
passed in 1542–1543, 34.
infants, idiots or persons de non sane could not devise land by will under the, 35.
passed in 1540, 34.
provisions of, 35, 36.
purpose of, 34, 35.

Statute of Wills—*Continued*
statutes of the American states are based on the English common law as modified by the, 36.
woman covert could not devise lands by will under the, 35.
Strike, in mining, 438, 439.
Subletting,
of leased premises, 214, 215, 259, 280, 288.
assignment of lease distinguished from, 214, 215, 259, 288.
covenant not to assign will not be broken by, 214, 259.
forfeiture of lease by, when, 308.
under early law tenant could not sublet until he came into possession, 280.
of tenancy, 214, 215.
Summary Proceedings, by landlord to recover possession of premises at expiration of lease, 314.
Surface Waters,
waste or diffused, 338, 339.
not subject to appropriation, when, 338.
Surrender,
of a lease, 309, 310.
abandonment of premises by tenant not a, 310.
by express words, 309.
by operation of law, 309.
Surrogate's courts, 186, 190.

Taxation,
covenants in leases to pay taxes, 256, 258.
of mining claims, 470.
Tenancy, 201-215. See also Estates; Lease; Landlord and Tenant.
assignment of, 214, 215.
at will, 206, 207, 237.
arises, when, 206, 207.
created, how, 206, 207, 237.
parol lease creates a, when, 233.
rent, reservation of, effect of, on, 206, 207.
tenancy by sufferance distinguished from, 208.
terminated,
at will of either party, 213.
by notice to quit, 213, 305.
upon death of lessee or lessor, 213, 305.
by sufferance, 207-209, 305, 312.
defined, 207, 208.
creation of, 208, 209.
arises by holding over without consent of lessor, 208.
what is necessary, 208.
notice to terminate, 208, 305.
tenancy at will distinguished from, 208.

Tenancy, by sufferance—*Continued*
tenant by sufferance,
does not hold by adverse possession, 209.
not entitled to notice to quit, 213.
who refuses to leave at request of landlord becomes a trespasser, 208.
creation of,
to commence at once, 211.
to commence in the future, 211.
duration of, 211-215.
construed against lessor and in favor of tenant, 212.
may depend upon construction of lease, 212.
entry by tenant, 213, 214.
for definite term, 303.
termination of, 303.
for life, 202, 203, 237.
created by deed or will, 202.
for years, 203-206, 223, 237.
at common law considered as a chattel interest, 203.
by statute treated as real property, when, 203.
commencement of, determined by language of the lease, 211.
duration of, 211.
"from a certain day," 211, 303.
lease of, 223.
"term," defined, 204.
"to a certain day," 212, 303.
under feudal system, 203.
"years," term defined, 203.
from month to month, 206.
terminated only by notice to quit, 213, 304.
from year to year, 204-206, 237.
abolished by statute in some states, 206.
created, how, 204, 205.
death of either party will not terminate, 305.
duration of, 211.
example of, 205.
lease for years distinguished from, 205.
terminated by notice to quit, 213, 304.
interesse termini, 213, 214. See also Interesse Termini.
kinds of, 202-210.
subject matter of, 201, 202.
subletting of, 214, 215.
termination of, 212, 303-311.

Tenure,
socage,
person holding land by, will of, 34.

Testaments. See Will.

Testator,
defined, 27, 28.
acknowledgment of will by, 61, 90, 100.
capacity of, 49, 50.
disabilities, 51-55.
as to age, 54, 55.
of aliens, 50, 51. See also Aliens.
of criminals, 50. See also Criminals.
of married women, 50-54. See also Married Women.
incapacity of, at time of making will, 49.
republication of will upon becoming capacitated, 49.
power of, to make a will, 41-43, 49-55.
not a natural or absolute right, 42.
not a property right, 41-43.
who may make, 49, 50.
Timber and Stone Act of 1878, 411.
grants under, 411.
land may now be purchased at its appraised value, 411.
Torts,
actions for,
against decedent do not survive him, 171, 172.
in favor of decedent survive him by statute, 172.
Towns, acquisition of town sites in public lands, 412.
Trade Fixtures. See also Fixtures.
defined, 264.
articles necessary for purpose of carrying on business as, 264, 266.
nursery stock as, 264.
reasons for considering certain articles annexed to the land as, 266.
treated as personal property, 266.
Trees, lease of, 201.
Trespass, liability of landlord for injury to trespassers, 274.
Trust,
breach of, by administrator or executor, 165.
creation of, by the relation of guardian and ward, 192, 198.
Trustees, rules governing, 4.
Tunnel Rights,
in mining, 458, 459.
provisions of United States Revised Statutes respecting, 458.
regulations of United States Land Department respecting, 459.
tunnel proprietors,
acquire no rights in blind veins, 459.
must give notice, 459.
recording necessary by, 459.
tunnel site cannot be patented, 459.

Underflow,
defined, 333.
disturbance of sub-surface flow, remedies for, 334.

Underflow—*Continued*
land made productive by use and enjoyment of, protected, 334.
of natural streams in arid regions, 333.
percolation distinguished from, 336.
seepage waters distinguished from, 337.
waters of, subject to appropriation for beneficial use, 333, 334.
Underground Streams, 334, 335.
"developed" waters, 335.
kinds of, 334.
not a tributary to the main stream, 335.
waters of, are subject to appropriations for beneficial use, 334.
which are entirely subterranean, 334.
which form part of the surface streams, 334.
Undue Influence,
execution of will by, 75, 78-81.
evidence necessary, 79-81.
admissibility, 81.
illustrations, 79-81.
presumption,
that fiduciary relationship created, when, 80.
that testator acted as a free agent, when, 79.

Veins,
of minerals, 407, 418-420, 447, 448, 451, 452.
defined, 418-420.
broad lodes, 449, 450.
chambers and lenses, 418.
classification of, 418.
contact, 418.
continuity and identity of, necessary to establish extralateral right, 451.
cross and intersecting, 407.
genetic theories in respect to, 418.
intrusive dikes, 418.
kinds of, 418.
of segregation and replacement, 418.
placer deposits distinguished from, 440.
primary, 448.
rock in place necessary to make, 420, 421, 452.
true tissue, 418.
under federal acts of 1866 and 1872, 407.
Vendor and Purchaser,
contract to sell,
intention of parties as gathered from instrument, 231.
lease distinguished from, 231, 232.
landlord and tenant, relation of, distinguished from, 226, 227.
purchaser from executor of a will, rights of, 154.

Vendor and Purchaser—*Continued*
sale,
by landlord, 271, 305, 306.
will not of itself terminate a lease, 305, 306.
Vested Rights, of devisees or legatees in a will, 47, 48.

Ward. See Guardian and Ward.
Waste,
alteration or change in the interior of buildings, when, 284, 285.
covenants in leases not to commit, 258, 284, 285.
illustration of, 284, 285.
implied covenant of tenant not to commit, 279, 284, 285, 287.
in mining operations, injunction to restrain, 478.
may result from positive acts of destruction, 284.
opening of a new mine as, at common law, 285.
question of, arises frequently in regard to repairs, 284.
Water,
as property, 355-369.
private titles accrue to private appropriator, how, 355.
source of title, 355-357.
from Government of the United States, 355.
from the state in which the stream is located, 355, 356.
under acts of Congress of 1866 and 1870, 357, 358.
under Desert Land Act of 1877, 358, 359.
one of the universal elements to which the idea of property attaches, 315.
rights in, 316, 317, 322, 328, 360, 361, 370-381. See also Riparian Rights.
abandonment of, 370-373. See also Abandonment, of water rights.
acquisition of, by prescription, 373, 374. See also Prescription.
adjudication of, 375-381. See also under this heading, title in.
adverse user of, may acquire title, when, 373.
appurtenant, 359, 360.
are incorporeal hereditaments, 363, 364, 366.
are usufructuary, 363, 364.
as property, 355-369.
do not extend to corpus of the water, 362, 363.
under acts of Congress of 1866 and 1870, 357, 358.
under Desert Land Act of 1877, 358, 359.
by appropriation, 317-320, 322, 340-354, 374. See also Appropriation, of water founded on beneficial use.
constitute an easement in the ditch and appurtenant land, 364.
conveyance of, 364-366, 370.
methods of, 365, 366.
extent of, 362-364.
extinguishment of, 370-374.
for,
agricultural purposes, 316.

Water, rights in, for—*Continued*
domestic purposes, 316.
irrigation, 316.
manufacturing purposes, 316.
mining, 316.
navigation, 315.
power purposes, 316, 317.
the incidental advantages to the land through which the waters flow, 316.
illustrated, 316, 317.
in general, 315.
lease of, 201.
prescriptive right, creation of, in, 373, 374. See also Prescription.
private, 316.
possess the attributes of property, 316.
public, 315, 316.
for navigation, 315.
regulation of, 316, 317, 375-384.
by adjudication, 375-381.
by administration, 381-384.
systems of, 316.
under statutes, 375-384.
riparian, 315-322. See also Riparian Rights.
severance of, from property rights, 360.
statutory regulation, 375-384.
of titles not of record, 375-381.
title in, 355, 358-360, 375-381.
by adjudication, 375-381.
decrees, 379-381.
final, when, 380, 381.
force and effect, 380.
founded on sworn statements of record, 375.
in Colorado, 378-381.
procedure, 378, 379.
proofs taken before court or referee, 379.
statutory provisions respecting, 377-381.
by administration, 381-384.
by operation of law, 361.
early methods of determining, 376.
not of record, 375-381.
source of, 355, 358.

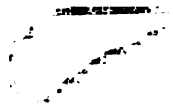
Water Commissioners,
distribution of water for irrigation purposes by, 382.
duties of, 382.

Waterworks,
construction of, 352, 385-392.
canals, 385, 386.
dams, 386, 387.

Waterworks, construction of—*Continued*
diligence in, 352.
eminent domain, right of, in, 387, 388.
physical structures, 385-388.
reservoirs, 386.
rule of relation back applied, 352.
control of, 388-392.
liability of owners for damages from break or leak in ditch or reservoir, 388.
management of, 385-392.
organization of water districts, 382, 383.
division engineers, 382, 383.
state engineers, 383.
water commissioners, 382.
ownership of, 388-392.
"Wife's Part," defined, 35.
Will,
defined, 26-30, 63, 64.
ademption of devises and legacies, 133-138. See also Ademption.
administration of estates under a, 142-183. See also Administration, of estates; Executor.
advancement, satisfaction of devise or legacy by, 125, 136, 137. See also Advancement.
agreement to will property will be enforced in equity, 42.
alternative, 46, 47. See also Alternative Wills.
attestation of, by witnesses, 69, 72, 73, 96-104. See also Attestation, of a will.
beneficiaries of a, 13, 15, 16, 40, 47, 55-58. See also Beneficiary, of a will.
"bequest," 27, 28. See also Devise; Legacy.
codicil, 29, 61, 70, 74, 105, 106, 124-128. See also Codicil.
construction and operation of, 4.
devise, 27, 129-133, 141, 142, 177. See also Devise.
devisee, defined, 28.
devisor, defined, 28.
does not operate until death of testator, 29, 30.
gifts distinguished from, 29, 30.
"give," explained, 27.
history of,
in general, 26-58.
in the United States, 36.
statutes are based upon the English common law as modified by the Statute of Wills, 36.
holographic, defined, 28.
Illinois Statute of Wills, 72-74.
intestate, defined, 27.
in the early Roman law, 32.
invalid, 47.

Will, invalid—*Continued*
attempt by legislature to make an, valid after death of testator, unconstitutional, 47.
is ambulatory until death, 59, 60, 128, 129.
defined, 59, 129.
is purely statutory, 60-74.
joint, 43, 44. See also Joint Will.
joint and mutual, 43-46. See also Joint and Mutual Will.
kinds of, 28, 29.
"last will and testament," 26, 89.
legacy, 28, 129-138, 171, 177, 178. See also Legacy.
defined, 28.
legatee,
defined, 28.
modern, unknown at common law, 60.
must be the product of the testator's free will, 79.
mutual, 43-45. See also Joint Will; Joint and Mutual Will.
nuncupative, 28, 49. See also Nuncupative Wills.
of,
after-acquired property, 41, 131. See also After-Acquired Property.
sailors, 29, 63, 69.
soldiers, 29, 63, 69.
origin of,
coincident with the rise of private property, 31, 32.
in England before Norman Conquest, 32.
known to Greeks and Romans, 31.
power to make a, 41-43. See also Testator.
proving of, under Statute of 7 Wm. IV & 1 Vict., 70.
republication of, 49, 124-126. See also Republication, of a will.
revival of, 59, 126-128. See also Revival, of a will.
revocation of, 105-123. See also Revocation, of a will.
status of a, in England,
after the Norman Conquest, A. D. 1066, 32, 33.
in the fourteenth and fifteenth centuries, attempt of the courts of equity to revive the right to will lands, 33, 34.
prior to the Norman Conquest, A. D. 1066, 32.
Statute De Donis, A. D. 1285, effect of, on wills, 33.
Statute of Frauds, A. D. 1677, provisions of, in relation to wills, 60-63, 105.
Statute of 7 Wm. IV & 1 Vict. c. 26, 1837, provisions of, relating to wills, 36, 56, 63-72. See also Wills Act.
Statute of Uses, effect of, on wills, 34.
Statute of Wills, 34-36. See also Statute of Wills.
statutory requirement that a, shall be in writing, 60-63, 72.
by Statute of Frauds, 60-63.
by Statute of Illinois, 72.
testamentary power, extent of, 36-41.
general rule, 36, 37.

Will, testamentary power, general rule—*Continued*
exceptions to, 37-41.
testate, defined, 27.
testator, 27, 28, 41-43, 49, 55. See also Testator.
testatrix, defined, 27.
under Anglo-Saxon law, 32.
under the feudal system, 32.
unwritten,
defined, 28.
where permitted, 28, 29.
vested rights of devisees in a, 47, 48.
written, defined, 28.
Wills Act,
of 7 Wm. IV & 1 Vict. c. 26, A. D. 1837, 36, 56, 63-72.
corporations as beneficiary under, 56.
provisions of, in full, 63-72.
Witness,
to a will,
can have no beneficial interest in the will, 69, 73, 96.
statutes of Illinois and 7 Wm. IV & 1 Vict., 69, 70.
competency of, 96-98.
criminal cannot be a, 97, 98.
executor as a, 98, 99.
father, son or other relative when a competent, 98.
husband or wife of a beneficiary not a competent, 97.
legatee or devisee who acted as,
at common law made will void, 96.
under statute not permitted to take anything under the will, 96, 97.
number, 96.
should see testator sign the instrument, 99.
signature of, what amounts to, 101.
under Statute of Frauds and Illinois Statute of Wills, 99.
Woman Covert. See Feme Covert; Married Women.



Stanford Law Library
3 6105 06 124 618 2
FORD UNIVERSITY LAW LIBRARY